SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 180

NORMAN SEE, APPELLANT,

vs.

CITY OF SEATTLE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., OCTOBER 17, 1966

[fol. A] [File endorsement omitted]

[fol. 1]

IN THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

No. 38779

CITY OF SEATTLE, Plaintiff,

—VS.—

NORMAN E. SEE, Defendant.

AGREED STATEMENT OF FACTS—Filed June 18, 1964

Comes Now the appellant, defendant in the above entitled action, and, through his counsel, submits the following Statements of Facts:

I.

That at all times mentioned herein, the defendant was and is the owner of certain premises at 1549 N. W. 49th Street, Seattle, King County, Washington, upon which there is located a warehouse building which premises were and are maintained as locked premises by defendant, and inaccessible to anyone except the defendant.

II.

That on or about the 14th day of February, 1963, the City of Seattle Fire Department, through its authorized representative, demanded of the defendant that an inspection be allowed as to the said locked premises; that the said Fire Department did not procure a search warrant nor present such to defendant. That no claim was made that the said Fire Department had any reasonable cause to believe a violation of the ordinance existed at the time

of the said demand. That the defendant, on said date, refused to allow the said Fire Department to make such inspection.

III.

That on the 27th day of February, 1963, a warrant was issued for the arrest of the defendant for violation of City [fol. 2] of Seattle Ordinance No. 87870, Section 8.01.050. That the cause proceeded to trial on the 15th day of March, 1963, upon a plea of not guilty, in Municipal Court, before Judge Walter T. McGovern, and that defendant was adjudged guilty, appeal bond set at $100.00, which was paid, and appeal taken to Superior Court.

IV.

That the cause came on for trial in the above entitled Superior Court on the 10th day of March, 1964, before the Honorable Henry W. Cramer, Judge of the above Superior Court. Jury trial was waived and the matter heard on stipulated facts in accordance with the foregoing statement of facts, and in addition, an uncertified copy of Sections 8.01.010 through 8.01.140, was admitted into evidence as a true copy of the provisions in force at the times mentioned herein in accordance with stipulation of both counsel. A true copy of such is attached hereto as Exhibit No. 1.

Counsel for appellant submitted argument on three points, which are also the points relied upon by appellant in this appeal, and are as follows:

1. That Section 8.01.050 does not specifically by its terms give authority to the Fire Chief or his representative to enter all buildings and premises without any showing of reasonable or probable cause.

2. That if Section 8.01.050 does, in fact, when read with the rest of the ordinance provisions, grant such authority to the Fire Chief or his representative to enter a locked building, such as appellant's warehouse, with-

out a search warrant or a showing of reasonable cause, then it is appellant's claim that such ordinance is unconstitutional as authorizing unreasonable search, and in violation of Amendment IV, United States [fol. 3] Constitution, and Article I, Section 7, State of Washington Constitution.

3. That said Section 8.01.050 and Section 8.01.040 of said ordinance further violates the privileges and immunity clauses found in Amendment XIV, United States Constitution and Article I, Section 12, State of Washington Constitution.

V.

Plaintiff counsel, on behalf of the City of Seattle, submitted argument in support of said ordinance, and the Court thereupon entered findings of fact in accordance with the above statement of facts and the conclusion of law that the defendant be adjudged in violation of said ordinance, Section 8.01.050, for refusal to allow inspection of his said premises. Finding of Fact, Conclusions of Law and Judgment were entered the 24th day of March 1964, by the Court. A true copy of said Judgment, marked Exhibit No. 2, is attached hereto. That appellant caused notice of appeal from said judgment to be served and filed on the 13th day of April, 1964. A copy of said Notice of Appeal, marked Exhibit No. 3, is attached hereto.

Submitted this 18th day of June, 1964.

Abbott & Curtis, Attorneys for Appellant, By Andrew Curtis, Jr.

The above Statement of Facts is hereby acknowledged to be an Agreed Statement of Facts this 18th day of June, 1964.

A. L. Neubold, Corporation Counsel for the City of Seattle, By William L. Parker, Assistant Corporation Counsel.

[fol. 4]

EXHIBIT 1 TO AGREED STATEMENT OF FACTS

CHAPTER 8.01.

GENERAL PROVISIONS

SECTIONS:

8.01.010 Intent.

8.01.020 Powers and duties of the fire chief.

8.01.030 Application to new and existing conditions.

8.01.040 Authority to enter premises.

8.01.050 Inspection of buildings and premises.

8.01.060 Orders to eliminate dangerous or hazardous conditions.

8.01.070 Service of orders.

8.01.080 Permits.

8.01.090 Revocation of permit.

8.01.100 Fire drills in schools and institutional occupancies.

8.01.110 Fire prevention advisory board.

8.01.120 Definitions.

8.01.130 Repealer.

8.01.140 Penalty.

8.01.010 INTENT. This Title, referred to as the Fire Code, prescribes minimum standards for the safeguarding of life and property from the hazards of fire and explosion arising from the storage, handling and use of hazardous substances, materials and devices, and from conditions hazardous to life or property in the use or occupancy of buildings or premises. Hazards which are governed by specific reference shall also be subject to all other applicable pro-

visions of this Title. (Ord. 87870 § 8.01.010; January 19, 1959).

8.01.020 POWERS AND DUTIES OF THE FIRE CHIEF. The Fire Chief is hereby authorized and directed to enforce this Title unless otherwise expressly provided herein or by City Charter. (Ord. 87870 § 8.01.020; January 19, 1959).

8.01.030 APPLICATION TO NEW AND EXISTING CONDITIONS. The provisions of this Title shall apply equally to new and existing conditions; provided, that those existing conditions which the Fire Chief has determined by rule or in writing do not constitute an immediate hazard to life or property may be continued. (Ord. 87870 § 8.01.030; January 19, 1959).

8.01.040. AUTHORITY TO ENTER PREMISES. The Fire Chief shall investigate the cause of every explosion or fire, and may enter any premises, including dwellings, for such purpose, and may enter, investigate and inspect any dwelling when he has reasonable cause to believe a violation of the provisions of this Title exists therein. (Ord. 87870 § 8.01.040 as amended by Ord. 88339; June 29, 1959).

8.01.050 INSPECTION OF BUILDING AND PREMISES. It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascer- [fol. 5] taining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards. (Ord. 87870 § 8.01.050; January 19, 1959).

8.01.060 ORDERS TO ELIMINATE DANGEROUS OR HAZARDOUS CONDITIONS. Whenever the Fire Chief finds in any building or upon any premises dangerous or hazardous conditions or materials, he shall order such dangerous conditions or materials to be removed or remedied in such manner as may be specified herein, particularly:

1. Dangerous or unlawful amounts of combustible or explosive or otherwise hazardous materials;
2. Hazardous conditions arising from defective or improperly installed equipment for handling or using combustible or explosive or otherwise hazardous materials;
3. Dangerous accumulations of rubbish, waste paper, boxes, shavings or other highly flammable materials;
4. Accumulations of dust or waste material in air conditioning or ventilating systems or of grease in kitchen or other exhaust ducts;
5. Obstructions to or on fire escapes, stairs, passageways, doors or windows, liable to interfere with the operations of the Fire Department or egress of occupants in case of fire;
6. Any building or other structure which, for want of repairs, lack of sufficient fire escapes or other exit facilities, automatic or other fire alarm apparatus or fire extinguishing equipment, or by reason of age or dilapidated condition, or from any other cause, creates a hazardous condition.

(Ord. 87870 § 8.01.060; January 19, 1959).

8.01.070 SERVICE OF ORDERS. (a) The service of orders for the correction of violations of this Title shall be made upon the owner, occupant or other person responsible for such conditions, either by delivering a copy thereof to such person or by delivering the same to and leaving it with any person in charge of the premises, or in case no such person is found upon the premises, by affixing a copy thereof in a conspicuous place on the door to the entrance of the said premises. Whenever it may be necessary to serve such an order upon the owner of premises, such order may be served either by delivering to and leaving with the said person a copy of the said order, or, if such owner is absent

from the jurisdiction of the officer making the order, by sending such copy by registered mail to the owner's last known post office address.

(b) If buildings or other premises are owned by one person and occupied by another, under lease or otherwise, the orders issued in connection with the enforcing of this Title shall apply to the occupant thereof, except where the [fol. 6] rules or orders erquire the making of additions to or changes in the premises themselves, such as would immediately become real estate and be the property of the owner of the premises; in such cases the rules or orders shall affect the owner and not the occupant unless it is otherwise agreed between the owner and the occupant. (Ord. 87870 § 8.01.070; January 19, 1959).

8.01.080 PERMITS. (a) A permit shall constitute permission to maintain, store or handle materials, or to conduct processes, which produce conditions hazardous to life or property, or to install equipment used in connection with such activities. Such permit does not take the place of any license required by law. It shall not be transferable, and any change in use or occupancy of premises shall require a new permit. A charge shall not be made for such permit or renewal unless expressly stated by ordinance.

(b) Before a permit may be issued, the Fire Chief shall inspect and approve the receptacles, vehicles, buildings, or storage places to be used. In cases where laws or regulations enforceable by departments other than the Fire Department are applicable, joint approval shall be obtained from all departments concerned.

(c) All applications for permit required by this Title shall be made to the Fire Chief in such form and detail as he shall prescribe. Applications for permit shall be accompanied by plans as required by the Fire Chief.

(d) Permits shall at all times be kept on the premises designated therein, and shall at all times be subject to in-

spection by an officer of the Fire or Police Departments. Permits shall be renewed annually upon notice from the Fire Department. (Ord. 87870 § 8.01.080; January 19, 1959).

8.07.090 Revocation of permit. The Fire Chief may revoke a permit or approval issued where a violation of this Title is found upon inspection or there has been any false statement or misrepresentation as to a material fact in the application or plans on which the permit or approval was based. (Ord. 87870 § 8.01.090; January 19, 1959).

8.01.100 Fire drills in schools and institutional occupancies. (a) Fire drills shall be held at least once a month in schools where such occupancies constitute the major occupancy of a building, and at least once every two months in institutional occupancies where such occupancies constitute the major occupancy of a building. During severe weather, fire drills may be postponed. A record of all fire drills shall be kept on the premises subject to inspection of the Fire Chief.

(b) In schools, fire drills include complete evacuation of all persons from the building. In institutional occupancies, fire drills shall be conducted to familiarize operating personnel with their assigned positions of emergency duty; complete evacuation of occupants from the building at the [fol. 7] time of the fire drill shall be required only where it is practicable and does not involve moving or disturbing persons under medical care. (Ord. 87870 § 8.01.100 as amended by Ord. 88339; June 29, 1959).

8.01.110 Fire prevention code advisory board. The Fire Prevention Code Advisory Board, as created by Resolution No. 17432, shall examine administrative rulings of the Fire Chief relating to this Title and make recommendations, but it shall act in an advisory capacity only. (Ord. 87870 § 8.01.110; January 19, 1959).

8.01.120 DEFINITIONS. Unless otherwise expressly stated, the following terms shall, for the purpose of this Title, have the meanings indicated in this section. See the Building Code for additional definitions.

"APPROVED" means accepted by the Fire Chief as a result of investigation and experience or by reason of test, listing or approval by Underwriters' Laboratories, Inc., the National Bureau of Standards, the American Gas Association Laboratories or other nationally recognized testing agencies and the standards provided herein.

"AUTOMATIC FIRE ALARM SYSTEM" means a system which automatically detects a fire condition and actuates a fire alarm signal device.

"DWELLING" means a building occupied exclusively for residence purposes and having not more than two (2) dwelling units or as a boarding or rooming house serving not more than fifteen (15) persons with meals or sleeping accommodations or both.

"DWELLING UNIT" means one (1) or more rooms arranged for the use of one (1) or more individuals living together as a single housekeeping unit, with cooking, living, sanitary and sleeping facilities.

"FIRE CHIEF" means the head of the Fire Department and his authorized representatives.

"FIRE RESISTANCE RATING" means the time in hours that the material or construction will withstand the standard fire exposure as determined by a fire test made in conformity with the "Standard Methods of Fire Tests of Building Construction and Materials" of the American Society for Testing Materials ASTM E119 (C.F. 236287).

"HIGH HAZARD OCCUPANCY" means the occupancy or use of a building or structure or any portion thereof that involves highly combustible, highly flammable, or explosive

material, or which has inherent characteristics that constitute a special fire hazard.

"I. C. C. CONTAINER" means any container approved by the Interstate Commerce Commission for shipping any liquid, gaseous or solid material of a flammable, toxic or other hazardous nature.

"INDUSTRIAL OCCUPANCY" means the occupancy or use of a building or structure or any portion thereof for as-
[fol. 8] sembling, fabricating, finishing, manufacturing, packaging or processing operations, except when classed as a high hazard occupancy.

"INSTITUTIONAL OCCUPANCY" means the occupancy or use of a building or structure or any portion thereof by persons harbored or detained to receive medical, charitable or other care or treatment, or by persons involuntarily detained.

"MERCANTILE OCCUPANCY" means the occupancy or use of a building or structure or any portion thereof for the displaying, selling or buying of goods, wares or merchandise, except when classed as a high hazard occupancy.

"MULTIFAMILY HOUSE" means a building or portion thereof containing three (3) or more dwelling units, including tenement house, apartment house, flat.

"OWNER" means any person having title to, or control as guardian or trustee, of a building or property.

"PERSON" means one (1) or more natural persons of either sex, association, co-partnership or corporation, whether acting by themselves or by a servant, agent or employee; the singular number includes the plural, and the masculine pronoun includes the feminine.

"RESIDENTIAL OCCUPANCY" means the occupancy or use of a building or structure or any portion thereof by persons for whom sleeping accommodations are pro-

vided but who are not harbored or detained to receive medical, charitable or other care or treatment, or are not involuntarily detained.

"STORAGE OCCUPANCY" means the occupancy or use of a building or structure or any portion thereof, for the storage of goods, wares, merchandise, raw materials, agricultural or manufactured products, including parking garages, or the sheltering of livestock and other animals, except when classed as a high hazard occupancy. (Ord. 87870 § 8.01.120; January 19, 1959).

8.01.130 REPEALER—SAVING. Ordinance 59867 designated "The Fire and Explosion Hazard Ordinance" of the City of Seattle and all amendments thereto and all other ordinances or parts thereof in conflict herewith are hereby repealed; provided, that such repeal shall not be construed as affecting the application of such ordinances to violations thereof prior to the effective date of this ordinance, and such violations shall be punishable according to the provisions of the ordinance in effect on the date such violations existed or were commenced, as if this ordinance had not been enacted. (Ord. 87870 § 8.28.010; January 19, 1959).

8.01.140 PENALTY. Anyone violating or failing to comply with any provision of this Title or lawful order of the Fire Chief pursuant hereto shall upon conviction thereof be [fol. 9] punishable by a fine not to exceed Three Hundred Dollars ($300.00), or imprisonment in the City Jail for a period not to exceed ninety (90) days, or by both such fine and imprisonment, and each day of violation shall constitute a separate offense. (Ord. 87870 § 8.28.020; January 19, 1959).

Chapter 8.02
TIRE REBUILDING PLANTS

Sections:

8.02.010 Permit required.

8.02.020 Construction and protection requirements.

8.02.030 Dust collecting system.

8.02.040 Flammable liquid application.

8.02.010 Permit required. A permit shall be required to conduct or maintain any tire recapping or rebuilding plant. (Ord. 87870 § 8.02.010; January 19, 1959).

8.02.020 Construction and protection requirements. Tire rebuilding plants shall conform to all the requirements in the Building Code for Group E, Division 3 occupancies, except that an approved automatic sprinkler system with water flow alarm equipment shall be installed where the area exceeds fifteen hundred square feet (1,500 sq. ft.). (Ord. 87870 § 8.02.020; January 19, 1959).

8.02.030 Dust collecting system. Buffing machines shall be located in a room separated from the remainder of the plant by construction having a fire-resistance rating of not less than one-hour, with each door opening protected by an approved self-closing fire door. Each machine shall be connected to an approved dust collecting system discharging to an approved container which shall be cleaned at frequent intervals. (Ord. 87870 § 8.02.030; January 19, 1959).

8.02.040 Flammable liquid application. The process of treating buffed tire carcasses with a sprayed mixture of rubber cement and thinner shall be conducted in a room or booth as required in Chapter 8.14 of this Code for the application of flammable finishes. (Ord. 87870 § 8.02.040; January 19, 1959).

CHAPTER 8.03

WRECKING YARDS, JUNK YARDS AND WASTE MATERIAL HANDLING PLANTS

SECTIONS:

8.03.010 Permit required.

8.03.020 Location.

8.03.040 Construction and protection requirements for picking rooms.

[fol. 10]

EXHIBIT 2 TO AGREED STATEMENT OF FACTS

[Stamp—Filed—1964 Mar 24 AM 11 14—Walter W. Renschler, Clerk King County Wash.]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

No. 38779

CITY OF SEATTLE,

Plaintiff,

—vs.—

NORMAN E. SEE,

Defendant.

JUDGMENT

THIS MATTER having come on regularly for trial before the undersigned Judge in open court, the defendant having appeared in person and with counsel, Andrew Curtis, Jr. of Abbott and Curtis, the plaintiff having appeared by its Deputy Corporation Counsel, William Parker, the matter

having proceeded to trial upon stipulation and upon argument of counsel, the Court heretofore having entered its Findings of Fact and Conclusions of Law, and being otherwise fully advised, now, therefore,

IT IS HEREBY ORDERED AND ADJUDGED that defendant, NORMAN E. SEE, is in violation of City of Seattle Ordinance No. 87870, Section 8.01.050, and in accordance with Section 8.01.040, a sentence is hereby passed and adjudged against said defendant in the amount of a fine in the sum of $100.00 suspended. It is further

ORDERED that the defendant be and he hereby is ordered to pay all costs incurred herein.

DONE IN OPEN COURT this 24 day of March, 1964.

/s/ HENRY W. CRAMER
JUDGE

Presented by

/s/ ANDREW CURTIS, JR.
of Abbott & Curtis
Attorneys for Defendant

Approved for Entry:

/s/ WM. L. PARKER
of Corporation Counsel

Commitment issued 4/1/64 (returned) Appealed.

Cert. copies of Judgment, Notice of Appeal and Appearance Docket entry mailed to the Clerk of the Supreme Court,—April 15, 1964.

[fol. 11]

EXHIBIT 3 TO AGREED STATEMENT OF FACTS

[Stamp—Filed—1964 Mar 24 AM 11 14—Walter W. Renschler, Clerk King County Wash.]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

No. 38779

CITY OF SEATTLE,

Plaintiff,

—vs.—

NORMAN E. SEE,

Defendant.

NOTICE OF APPEAL

Comes now NORMAN E. SEE, whose address is 4327 Fremont Avenue, Seattle, Washington, the above-named defendant, through his counsel, Andrew Curtis, Jr. of Abbott and Curtis, attorneys, and hereby gives notice of appeal by said defendant from the judgment entered in the above entitled matter. The offense for which defendant was charged was defendant's refusal to allow an inspection of certain premises belonging to the defendant, by the Fire Department of the City of Seattle. The offense was based on City of Seattle Ordinance No. 87870 relating to fire inspections and related matters. Judgment was entered by the Court on the 24 day of March, 1964, adjudging said defendant in violation of said Ordinance and imposing a

suspended fine in the amount of $100.00. This appeal is taken from each and every part of said judgment.

Dated this 13 day of April, 1964.

ABBOTT & CURTIS
Attorneys for Defendant-Appellant

by /s/ ANDREW CURTIS, JR.
420 N. E. Ravenna Blvd.
Seattle 15, Washington

Received: 11/13/64
/s/ W. L. PARKER

Cert. copies of Judgment, Notice of Appeal and Appearance Docket entry mailed to the Clerk of the Supreme Court,—April 15, 1964.

[fol. 12]

ATTACHMENT TO AGREED STATEMENT OF FACTS

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY
No. 38779

CITY OF SEATTLE,
Plaintiff,

—vs.—

NORMAN E. SEE,
Defendant.

CERTIFICATION OF STATEMENT OF FACTS

I, Henry W. Cramer, Judge of the Superior Court of the State of Washington, in and for King County, and Judge before whom the foregoing matter was heard.

Do Hereby Certify that the matters and proceedings contained in the foregoing Statement of Facts are matters and proceedings occurring in said cause, and the same are hereby made a part of the record therein, and

I Do Further Certify that the same contains such of the material facts, matters and proceedings heretofore occurring in the cause as the parties have agreed, and are all that are material therein.

Done in Open Court This 26 day of June, 1964.

/s/ Henry W. Cramer

[Stamps—Ent'd.—Filed—in County Clerk's Office—King County, Washington—Jun 26 1964—Walter W. Renschler, Clerk, By Leonard A. Wolfe, Deputy.]

[fol. 13]

In the Supreme Court of the State of Washington

No. 37651

Department Two

The City of Seattle, Respondent,

v.

Norman E. See, Appellant.

Opinion—November 24, 1965

Barnett, J.*—This case involves the fire code of the city of Seattle and is before the court upon stipulated facts. The defendant is the owner of a warehouse located in

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* Judge Barnett is serving as a judge pro tempore of the Supreme Court pursuant to Const. art. 4, § 2(a) (amendment 38).

Seattle. The warehouse is maintained as locked premises and is inaccessible to anyone except the defendant.

On or about February 14, 1963, the Seattle fire department, through its authorized representative, demanded of the defendant that an inspection be allowed as to the locked premises. The fire department did not procure a search warrant nor present such to the defendant, and no claim was made that the fire department *had any reasonable cause to believe a violation of the ordinance existed at the* [fol. 14] *time of the demand.* The defendant refused to allow the fire department to make the inspection.

Action was brought by the city against defendant by reason of the latter's refusal to submit to the fire inspection. A jury was waived and the case was tried on the stipulated facts in the Superior Court of King County. Defendant was found guilty and fined by the court $100 suspended.

Pertinent sections of the Fire Code, Seattle Ordinance 87870, follow:

Section 8.01.010:

> Intent. This Title, referred to as the Fire Code, prescribes minimum standards for the safeguarding of life and property from the hazards of fire and explosion arising from the storage, handling and use of hazardous substances, materials and devices, and from conditions hazardous to life or property in the use or occupancy of buildings or premises. Hazards which are governed by specific reference shall also be subject to all other applicable provisions of this Title. . . .

Section 8.01.050:

> Inspection of building and premises. It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, *except the interiors of dwellings,* as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards. : . . (Italics ours.)

Section 8.01.120:

Definitions. . . . "DWELLING" means a building occupied exclusively for residence purposes and having not more than two (2) dwelling units or as a boarding or rooming house serving not more than fifteen (15) persons with meals or sleeping accommodations or both.

Section 8.01.140:

Penalty. Anyone violating or failing to comply with [fol. 15] any provision of this Title or lawful order of the Fire Chief pursuant hereto shall upon conviction thereof be punishable by a fine not to exceed Three Hundred Dollars ($300.00) or imprisonment in the City Jail for a period not to exceed ninety (90) days, or by both such fine and imprisonment, and each day of violation shall constitute a separate offense. . . .

We are dealing here with a warehouse and business premises. It will be noted that § 8.01.050 specifically excepts the interiors of dwellings and consequently the same may not be inspected against the owner's will without a warrant. It should also be noted that we are not concerned here with the seizure of evidence for use in court and there is no threat of a criminal penalty even if a fire hazard were detected. Under the sections of the ordinance noted above, the fire chief is made responsible for enforcing the code.

It is first contended that § 8.01.050 is not sufficiently clear in statement and meaning to, in fact, give authority to the fire chief to enter all buildings and premises without any showing of reasonable or probable cause. We disagree.

The above is clear and unambiguous. It gives authority to the fire chief or his representative to enter commercial premises for purposes of inspection without any showing of reasonable or probable cause. No provision is made for securing a search warrant. A suspicion of violation of the ordinance is not a precondition to the inspection under the ordinance. Nor can it be suggested that the city exceeded its authority by the adoption of this ordinance. The en-

actment of reasonable ordinances regulating the inspection of buildings for fire hazards and procedures for forced elimination of fire hazards is within the police power of a [fol. 16] municipality. *Everett* v. *Unsworth*, 54 Wn.2d 760, 344 P.2d 728 (1959).

Since a search warrant is not required, we are immediately confronted with the question whether the ordinance is in violation of U. S. Const. Fourth Amendment and Const. art. 1, § 7.

The Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Const. art. 1, § 7 states:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

The above provisions in the United States and State Constitutions, although they vary slightly in language, are identical in purpose and substance. *State* v. *Miles*, 29 Wn. 2d 921, 190 P.2d 740 (1948). It is only unreasonable searches and seizures, made without probable cause, that are forbidden. *State* v. *Thomas*, 183 Wash. 643, 49 P.2d 28 (1935).

In deciding the precise question, we recognize that the numerous federal and state cases including our own that were cited are not apposite. The cases usually involve the authority to inspect which attaches when some type of regulated activity is undertaken, e.g., engaging in certain types of business affected with a public interest and, hence, subject to the police power of the state. See Davis, Federal Searches and Seizures § 9.2; and 4 Wharton's Crimi-

[fol. 17] nal Law and Procedure (Anderson ed. 1957) § 1532; *State* v. *McFarland*, 60 Wash. 98, 110 Pac. 792 (1910), relating to the licensing and inspection of hotels; *Gange Lumber Co.* v. *Henneford*, 185 Wash. 180, 53 P.2d 743 (1936), requiring taxpayers to furnish information as to their capital, debts, earnings, etc.; *Kelleher* v. *Minshull*, 11 Wn.2d 380, 119 P.2d 302 (1941), authorizing access to the office and place of business of the individual and permitting an examination of the books, pertaining to the small loan business. These cases typify the sustained constitutionality of ordinances and statutes regarding inspection with which we have been concerned.

We are not here involved with a regulated activity giving rise to routine inspections. The question is whether a search without warrant, unjustified by suspicion of reasonable cause, is permitted.

Two cases recently decided by the Supreme Court of the United States are in point.

The first case is *Frank* v. *Maryland*, 359 U.S. 360, 3 L.Ed. 2d 877, 79 Sup. Ct. 804, argued March 5, 1959, and decided May 4, 1959. Therein it was held that the power to inspect dwelling places *either as a matter of systematic area-by-area search*, or to treat a specific problem of rat infestation is of indispensable importance to the maintenance of community health. The court stated that this power would be greatly hobbled by blanket requirement of safeguards [fol. 18] necessary for a search of evidence of criminal acts. It was held that the Baltimore ordinance providing that whenever the commissioner of health *shall have cause* to suspect that a nuisance exists in any house, cellar, or inclosure, he may demand entry therein in the daytime and if the owner or occupant shall refuse or delay to open the same and admit a free examination he shall forfeit and pay for every such refusal the sum of $20. Mr. Justice Frankfurter, speaking for the court, said, p. 366:

> The power of inspection granted by the Baltimore City Code is strictly limited, *more exacting than the analogous provisions of many other municipal codes.*

Valid grounds for suspicion of the existence of a nuisance must exist. Certainly the presence of a pile of filth in the back yard combined with the run-down condition of the house gave adequate grounds for such suspicion. The inspection must be made in the day time. Here was no midnight knock on the door, but an orderly visit in the middle of the afternoon with no suggestion that the hour was inconvenient. Moreover, the inspector has no power to force entry and did not attempt it. A fine is imposed for resistance, but officials are not authorized to break past the unwilling occupant.

. . . . .

The need to maintain basic, minimal standards of housing, to prevent the spread of disease and of that pervasive breakdown in the fiber of a people which is produced by slums and the absence of the barest essentials of civilized living, has mounted to a major concern of American government. The growth of cities, the crowding of populations, the increased awareness of the responsibility of the state for the living conditions of its citizens, all have combined to create problems of the enforcement of minimum standards of far greater magnitude than the writers of these ancient inspection laws ever dreamed. Time and experience have forcefully taught that the power to inspect dwelling places, *either as a matter of systematic area-by-area search* or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards *necessary for a search of evidence of criminal acts.* The need for preventive action is great, and city after city has seen this need and granted the power of in- [fol. 19] spection to its health officials; and these inspections are apparently welcomed by all but an insignificant few. Certainly, the nature of our society has not vitiated the need for inspections first thought neces-

sary 158 years ago, nor has experience revealed any abuse or inroad on freedom in meeting this need by means that history and dominant public opinion have sanctioned.

That there is "a total unlikeness" between "official acts and proceedings," *Boyd* v. *United States,* 116 U. S. 616, 624, for which the legal protection of privacy requires a search warrant under the Fourteenth Amendment, and the situation now under consideration is laid bare by the suggestion that the kind of an inspection by a health official with which we are concerned may be satisfied by what is, in effect, a synthetic search warrant, an authorization "for periodic inspections." If a search warrant be constitutionally required, the requirement cannot be flexibly interpreted to dispense with the rigorous constitutional restrictions for its issue. A loose basis for granting a search warrant for the situation before us is to enter by way of the back door to a recognition of the fact that by reason of their intrinsic elements, their historic sanctions, and their safeguards, the Maryland proceedings requesting permission to make a search without intruding when permission is denied, do not offend the protection of the Fourteenth Amendment. (Italics ours.)

Frank establishes the proposition that reasonable administrative searches may be conducted without search warrants.

The other case is *Ohio ex rel. Eaton* v. *Price,* 360 U.S. 246, 3 L. Ed.2d 1200, 79 Sup. Ct. 978. That decision was appealed from the Ohio Supreme Court and decided June 8, 1959. The defendant owned and resided in a private residence in Dayton, Ohio. Three housing inspectors sought admittance to his home pursuant to a city ordinance which authorized them to enter any dwelling at a reasonable hour and upon showing proper identification for the purpose of inspecting the dwelling to determine if it conformed to the minimum standards of health and safety. The inspectors

gave no reason or cause for the particular inspection, but [fol. 20] merely told the defendant that they had a right to inspect any home.

Defendant was subsequently served with a warrant to appear in court for violation of the ordinance, which violation could result in a fine or imprisonment or both. As he was unable to provide bail, he was jailed. Eaton, an attorney, filed a petition for a writ of habeas corpus in the state court of common pleas against the chief of police. That court found the ordinance unconstitutional. It was reversed by the Ohio Court of Appeals.

The Ohio Court of Appeals (Montgomery County) in November, 1957, in *State ex rel. Eaton* v. *Price,* 105 Ohio App. 376, 152 N.E.2d 776, affirmed 168 Ohio St. 123, 151 N.E.2d 523 (1958), held that an ordinance which establishes minimum standards for dwellings, authorizes a housing inspector "to enter, examine and survey at any reasonable hour" same, and which provides penalties for violation thereof, was not arbitrary, discriminatory, or unreasonable. The Ohio court said that it is a valid exercise of the police power and that the inspection contemplated by such ordinance is not violative of the Ohio Constitution prohibiting "unreasonable searches." The court said, p. 391:

> After giving due consideration to the rulings in the cited cases and the applicable principles of law, we are of the opinion that in the instant case the inspection is a routine matter; it is to be made during reasonable hours and is primarily for protective and not punitive purposes, and is in the interest of the general welfare. The inspection contemplated by the ordinance is not an "unreasonable search" within the meaning of the provision prohibiting "unreasonable searches and seizures" . . . .

On appeal to the United States Supreme Court, the decision of the Ohio court was affirmed by an equally divided [fol. 21] court. The court stated that the facts in *Eaton* were similar to those in *Frank* and that it would be a mani-

festation of disrespect to allow the *Frank* case to be overruled so shortly after it was decided.[1]

Although, in affirming *Eaton*, the first group of justices stated that the facts in *Eaton* are similar to those in *Frank*, it should be noted that *Frank* held valid an ordinance authorizing a search by a health inspector without a warrant, if there were reasonable grounds for believing the house was below the minimum standards of health and safety. The ordinance in *Eaton* did not provide for any grounds or reasons for a search and, thus, would permit systematic area-by-area inspection, whereas, in *Frank*, it permitted inspection to treat a specific problem. We are reminded that Mr. Justice Frankfurter stated in *Frank* that area-by-area inspections are indispensable.

The above cases deal with a man's castle—his home. In the instant case, we are concerned with a warehouse and business property. The ordinance in question excepts the "interior of dwellings."

This case does not involve the search of evidence for criminal acts, but even the safeguards necessary for *such* evidence are not so stringent with reference to premises other than a man's home or dwelling.

In Davis, Federal Searches and Seizures § 1.31, p. 8, it was observed:

> [fol. 22] The requirements of the Fourth Amendment receive their strictest application when a dwelling house is involved in a search. This fact is based on the traditional concept of the sanctity of the home and the peaceful enjoyment of its privacy. . . .

The United States Supreme Court has applied different standards of reasonableness to searches of dwellings than to places of business. *Davis* v. *United States*, 328 U.S. 582 (1946), 90 L. Ed. 1453, 66 Sup. Ct. 1256. The lower federal

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[1] Mr. Justice Stewart declined to sit on the case because his father was serving on the Supreme Court of Ohio when the case came before the court.

courts also reflect this attitude: "We realize, of course, that the fact that the premises are a residence requires stricter requirements of reasonableness." *Smith* v. *United States,* 254 F.2d 751 (1958), *cert. denied* 357 U.S. 937, 2 L. Ed.2d 1552, 78 Sup. Ct. 1388. "It seems to be generally agreed that the Amendment applies most importantly to searches of dwelling houses . . . ." *United States* v. *Turner,* 126 F. Supp. 349 (1954). "What may be unreasonable in a search of a man's house, may be entirely reasonable in a search of his place of business." *Giacona* v. *United States,* 257 F.2d 450 (1958), *cert. denied* 358 U.S. 873, 3 L. Ed.2d 104, 79 Sup. Ct. 113.

The dissenting opinion in *Frank, supra,* deals primarily with the homeowner. It is there stated, p. 374:

> The decision today greatly dilutes the right of privacy which every homeowner had the right to believe was part of our American heritage. . . .
>
> The question in this case is whether a search warrant is needed to enter a citizen's home to investigate sanitary conditions. The Court holds that no search warrant is needed, that a knock on the door is all that is required, that for failure of the citizen to open the door he can be punished. . . .

[fol. 23] It is reasonable to believe that even the minority in *Frank* and *Eaton* would reach a different conclusion and apply different standards of reasonableness to a fact pattern such as that in the case at bar. A home is not involved in the instant case. A related issue is the knowledge gained by the inspection for possible use in any subsequent criminal cases. That is a question we do not pass upon at this time, since it is not before us. The ordinances in question authorize the fire chief to "enter all buildings and premises except the interior of dwellings as often as may be necessary" for finding and correcting any conditions liable to cause fires. No criminal charge is to be made upon discovery of a fire hazard. The code provides instead that whenever the fire chief finds in any building or upon any

premises dangerous or hazardous conditions he "shall order such dangerous conditions or material to be removed or remedied in such manner as may be specified." An "order for correction" is then served upon the owner or occupant of the premises. But it should be noted that an inspection in the present case was only for discovery of fire hazards. No evidence would be seized for use in court and there was no threat of criminal penalty even if fire hazards were detected.

Section 8.01.010 of the fire code, *supra,* prescribes minimum standards for the safeguarding of life and property in the use and occupancy of buildings other than dwellings. The purpose of the fire code inspections is to correct conditions hazardous to life and property. The problem of keep-
[fol. 24] ing cities and their inhabitants free from explosions and fires is a serious task facing all fire departments. It is obvious that routine inspections are necessary to insure the safeguarding of life and property. The need to conduct routine inspections of commercial premises, in regard to which probable cause for the issuance of a warrant could not ordinarily be established, outweighs the interest in privacy with respect to such premises. The purpose of the inspection contemplated by the code is not unreasonable.

There is no accepted yardstick for measuring the reasonableness of a search. What is reasonable is not determined by any fixed formula. The recurring questions of reasonableness of searches must find solution in the facts and circumstances of each case. This means the decided cases provide the only guidelines for determining the reasonableness of a search. See Davis, Federal Searches and Seizures; *United States* v. *Rabinowitz,* 339 U.S. 56 (1950), 94 L. Ed. 653, 70 Sup. Ct. 430.

In the light of *Frank* and *Eaton, supra,* we hold that the sanctions of U. S. Const. Fourth Amendment and Const. art. 1, § 7, have not been violated by the provisions of the Seattle Fire Code as herein set out.

Finally, it is urged by appellant that the ordinance is unconstitutional because it violates the equal protection clause of the U. S. Const. Fourteenth Amendment, and the privileges and immunities clause, Const. art. 1, § 12, as well. These violations, it is contended, are the result of the "arbitrary and unreasonable" classification of all build-
[fol. 24a] ings into those having not more than two dwelling units and serving not more than 15 persons and that of every other type of building.

The guarantee of equal protection of the laws and the prohibition of special privileges and immunities require that class legislation apply alike to all persons within a class, and reasonable ground must exist for making a distinction between those within and those without a specified class. *Clark* v. *Dwyer,* 56 Wn.2d 425, 353 P.2d 941 (1960). "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 489 (1955), 99 L. Ed. 563, 75 Sup. Ct. 461. Appellant does not suggest that that point has been reached in this case. The United States Supreme Court has, on another occasion, stated, "Equal protection does not require identity of treatment." *Walters* v. *City of St. Louis,* 347 U.S. 231, 237 (1954), 98 L. Ed. 660, 74 Sup. Ct. 505. The very act of classification involves some degree of discrimination. Equal protection "only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary." *Walters, supra.* There is remaining a wide area of legislative discretion.

We held in *State* v. *McFarland,* 60 Wash. 98, 110 Pac. 792 (1910), that a statute providing for the inspection of inns and hotels having 10 or more rooms was not an un-
[fol. 25] reasonable classification and did not violate either state or federal constitution. There is not a great deal of distinction between *McFarland* and the case at bar.

"A statutory enactment cannot be successfully attacked unless the discrimination or inequality produced by the particular classification is manifestly arbitrary, unreasonable, inequitable and unjust. . . ." *State* v. *Persinger*, 62 Wn.2d 362, 368, 382 P.2d 497 (1963). Such has not been shown to be the circumstances in the instant case.

Judgment affirmed.

Barnett, J. Pro tem.

I concur in the results.

Rosellini, C. J.

We Concur:

Finley, J., Weaver, J., Hamilton, J.

[fol. 26]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 37651

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—January 19, 1966

The Court having considered the appellant's petition for a rehearing herein,

It Is Ordered that the petition be and it is hereby denied.

Dated this 19th day of January, 1966.

By the Court:

Hugh J. Rosellini, Chief Justice.

67 W.D.2d 465

[fol. 27]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 37651

King County No. 38779

THE CITY OF SEATTLE, Respondent,

v.

NORMAN E. SEE, Appellant.

REMITTITUR—January 19, 1966

This is to certify that the opinion of the Supreme Court of the State of Washington filed on November 24, 1965, became the final judgment of this court in the above entitled case on January 19, 1966. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Three Hundred Thirty-one and 07/100 ($331.07) Dollars in favor of respondent and against appellant.

The Petition for Rehearing was Denied by an Order filed January 19, 1966.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 19th day of January, A.D. 1966.

William M. Lowry, Clerk of the Supreme Court, State of Washington.

cc: Court Reporter, Abbott & Curtis, Mr. Andrew Curtis, Jr., Hon. A. L. Newbould, Mr. Jerry F. King, Mr. Jorgen G. Bader, American Civil Liberties Union, Mr. Paul D. Jackson.

[fol. 28]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 37651

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 8, 1966

I.

Notice is hereby given that Norman E. See, the appellant above named, hereby appeals to the Supreme Court of the United States from the final Order of the Supreme Court of the State of Washington, entered January 19, 1966, upon Denial of Petition for Rehearing, affirming the judgment of conviction of the Superior Court of the State of Washington for King County, Cause No. 38779, dated March 24, 1964, finding appellant in violation of Section 8.01.050 of City of Seattle Ordinance No. 87870, referred to as the Fire Code.

This appeal is taken pursuant to 28 U.S.C. 1257 (2).

Appellant was convicted of the crime of refusing to allow the Fire Department of the City of Seattle to search (inspect) appellant's private warehouse premises without a search warrant, for the purpose of ascertaining whether or not conditions liable to cause fire, or any violations of the Fire Code, or any other Ordinance concerning fire hazards, were present, absent any suspicion or reasonable cause to believe that such conditions or violations existed. City of Seattle Ordinance No. 87870, Sections 8.01.050, 8.01.140. Appellant was sentenced to pay a fine of $100.00 suspended and all costs incurred. Appellant is now at large on bail.

II.

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme

[File endorsement omitted]

[fol. 29] Court of the United States, and include in said transcript the following:

1. Letter of appellant See to Fire Department, dated February 13, 1963.

2. Criminal Complaint.

3. Copy of Seattle City Ordinance Chapter 8.01.

4. Counsel's Stipulation as to facts, dated March 9, 1964.

5. Findings of Fact and Conclusions of Law of the King County Superior Court in case no. 38779, dated March 24, 1964.

6. Judgment of the Superior Court of King County, dated March 24, 1964.

7. Notice of Appeal to the Supreme Court of the State of Washington, dated April 13, 1964.

8. Decision of the Supreme Court of the State of Washington, dated November 24, 1965, in case no. 37651.

9. Remittitur.

III.

The following questions are presented by this appeal:

1. Is the Ordinance of the City of Seattle (Transcript document no. 3), invalid because repugnant to Amendment IV of the Federal Constitution, as invoked by the Due Process Clause of the Fourteenth Amendment, since it authorizes search of private premises, without search warrant, absent suspicion or any reasonable cause to believe that violations of the Ordinance or conditions liable to cause fire, exist, and without restriction as to time or number of such searches?

2. Was the conviction and sentencing of appellant under the aforesaid Ordinance of the City of Seattle, similarly invalid?

3. Should Frank vs. Maryland, 359 US 360, 3 L.Ed.(2d) 877, 79 S.Ct. 804 (1959) be overruled?

Paul D. Jackson of Hatch & Jackson, Counsel for Norman E. See, Appellant, 500 Central Building, Seattle, Washington 98104.

[fol. 30] Proof of Service (omitted in printing).

[fol. 31] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 32]

SUPREME COURT OF THE UNITED STATES

No. 180—October Term, 1966

NORMAN SEE, Appellant,

v.

CITY OF SEATTLE.

Appeal from the Supreme Court of the State of Washington.

ORDER NOTING PROBABLE JURISDICTION—October 10, 1966

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is placed on the summary calendar and set for oral argument immediately following No. 92.

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IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1902~~ 180

NORMAN SEE,

Appellant,

vs.

CITY OF SEATTLE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

October Term, 1965

No. .....

NORMAN SEE,

Appellant,

VS.

CITY OF SEATTLE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Washington, entered on November 24, 1965, affirming the judgment of the Superior Court of the State of Washington for King County, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that substantial questions are presented.

Opinion Below

The opinion of the Supreme Court of the State of Washington is unofficially reported at 67 Wash. Decisions 2, No. 9, pages 465-476 (1966). The opinion is set forth in full in the appendix hereto, *infra*, pp. 11-23.

Jurisdiction

This appeal is from the affirmance of a conviction for the violation of Ordinance No. 87870, Chapter 8.01 of the Seattle City Ordinances, known as the Fire Code. Appellant was sentenced to pay a fine of $100 suspended and was assessed all costs incurred.

The conviction originated in the Superior Court of the State of Washington for King County on March 24, 1964, on trial *de novo* without a jury on stipulated facts (R. 11), following conviction in the Municipal Court of the City of Seattle, a court not of record. The conviction was sustained on appeal by the Supreme Court of the State of Washington on November 24, 1965 (R. 13-26). A petition for rehearing was denied on January 19, 1966 (R. 26). Notice of appeal was filed in the Supreme Court of the State of Washington on April 8, 1966 (R. 28-30).

The statutory provision which confers jurisdiction of the appeal upon this Court is 28 U. S. C. 1257(2). The following cases sustain the jurisdiction of this Court to review the criminal conviction of the appellant herein by appeal: *Frank* v. *Maryland,* 359 U. S. 360 (1959); *Ohio ex rel. Eaton* v. *Price,* 360 U. S. 246 (1959).

Questions Presented

1. Whether Ordinance No. 87870 of the City of Seattle, Washington, which authorizes the inspection of buildings and premises by the Fire Chief, for the safeguarding of life and property from the hazards of fire and explosion, without either a warrant, or probable cause to believe a

violation of the ordinance exists, violates the Fourth and Fourteenth Amendments to the United States Constitution.

2. Whether *Frank* v. *Maryland*, 359 U. S. 360 (1959) should be overruled.

Statute Involved

Seattle Ordinance No. 87870

Section 8.01.010:

Intent. This Title, referred to as the Fire Code, prescribes minimum standards for the safeguarding of life and property from the hazards of fire and explosion arising from the storage, handling and use of hazardous substances, materials and devices, and from conditions hazardous to life or property in the use or occupancy of buildings or premises. Hazards which are governed by specific reference shall also be subject to all other applicable provisions of this Title.

Section 8.01.050:

Inspection of building and premises. It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards.

Section 8.01.120:

Definitions. . . . "DWELLING" means a building occupied exclusively for residence purposes and having not more

than two (2) dwelling units or as a boarding or rooming house serving not more than fifteen (15) persons with meals or sleeping accommodations or both.

Section 8.01.140:

Penalty. Anyone violating or failing to comply with any provision of this Title or Lawful order of the Fire Chief pursuant hereto shall, upon conviction thereof be punishable by a fine not to exceed Three Hundred Dollars ($300.00) or imprisonment in the City Jail for a period not to exceed ninety (90) days, or by both such fine and imprisonment, and each day of violation shall constitute a separate offense.

Statement[1]

That at all times mentioned herein, the defendant was and is the owner of certain premises at 1549 Northwest 49th Street, Seattle, King County, Washington, on which there is located a warehouse building, which premises were and are maintained as locked premises by defendant, and inaccessible to anyone except the defendant.

That on or about the 14th day of February, 1963, the City of Seattle Fire Department, through its authorized representative, demanded of the defendant that an inspection be allowed as to the said locked premises; that the said Fire Department did not procure a search warrant nor present such to defendant. That no claim was made that the said Fire Department had any reasonable cause to believe a violation of the ordinance existed at the time

[1] The statement of facts is taken verbatim from the stipulation of facts agreed to by the parties in the King County Superior Court (R. 1-2).

of the said demand. That the defendant, on said date, refused to allow the said Fire Department to make such inspection.

That on the 27th day of February, 1963, a warrant was issued for the arrest of the defendant for violation of City of Seattle Ordinance No. 87870, Section 8.01.050. That the cause proceeded to trial on the 15th day of March, 1963, upon a plea of not guilty, in Municipal Court before Judge Walter T. McGovern, and that defendant was adjudged guilty, appeal bond set at $100.00, which was paid, and appeal taken to Superior Court.

In Superior Court, King County, appellant raised and argued the claim that Ordinance No. 87870 authorizes unreasonable searches in violation of the Fourth Amendment to the United States Constitution (R. 2-3) and that the ordinance violates the Fourteenth Amendment to the United States Constitution (R. 3). The same claims were raised and argued on appeal to the Supreme Court of the State of Washington where they were explicitly rejected on the merits. Appendix, *infra*.

The Questions Are Substantial

1. *Ordinance No. 87870 Is Unconstitutional.*

The Supreme Court of Washington has held in this case that under the ordinance in issue, the Seattle Fire Chief or his representative may enter private commercial premises, to inspect for hazards of fire and explosion, without a warrant,[2] without probable cause or suspicion that any hazard

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[2] The ordinance makes no provision for securing a search warrant, nor was a warrant obtained in this case.

exists, nor as part of a systematic area-by-area search[3] or periodic inspection.[4]

Frank v. *Maryland, supra,* by a five-four vote, sustained the constitutionality of a city ordinance which authorized daylight inspection of buildings and premises without a warrant by Health Department officers who had cause to suspect the existence of a nuisance. Probable cause was in fact present in that case. 359 U. S. at 361, 366.

In sustaining the ordinance's constitutionality, Mr. Justice Frankfurter said:

> "The power of inspection granted by the Baltimore City Code is strictly limited, more exacting than the analogous provisions of many other municipal codes. Valid grounds for suspicion of the existence of a nuisance must exist. . . . The inspection must be made in the daytime." 359 U. S. at 366.

The ordinance in the case at bar is not "strictly limited." On its face, and as construed by the Supreme Court of Washington, the ordinance permits inspection of private premises, excluding the "interiors of dwellings," without a warrant and without "any reasonable cause to believe a violation of the ordinance existed at the time . . ." 67 Wash. Decisions 2, No. 9, at 466; appendix, *infra,* p. 11.

The court below, notwithstanding the absence of any restrictive standards in the ordinance, rested its decision on the distinction between standards of reasonableness, in the Fourth Amendment sense, required to search business property as contrasted to the search of a man's home or

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[3] *Frank* v. *Maryland, supra,* at 372.

[4] *Id.* at 383 (Douglas, *J.*, dissenting).

dwelling. The court relied upon *Davis* v. *United States*, 328 U. S. 582 (1946) for this distinction. Its reliance is misplaced, for the distinction drawn in *Davis* was not between commercial premises and residences, but between the private and public nature of the objects seized. Mr. Justice Douglas said in *Davis, supra*, at 589:

> "We are thus dealing not with *private* papers or documents but with *public* property in the custody of a citizen. The distinction between the two classes of property in the law of searches and seizures was recognized in *Wilson* v. *United States*, 221 U. S. 361."

And Mr. Justice Frankfurter, dissenting, not only made clear that the majority opinion did not hold that the search was validated by the distinction between commercial property and private residences, but warned of the serious danger in such a distinction:

> "An even more fundamental issue lurks in the Court's opinion if a casual but explicit phrase about the locus of the search and seizure as 'a place of business, not a private residence' is intended to carry relevant legal implications. If this is an indirect way of saying that the Fourth Amendment only secures homes against unreasonable searches and seizures but not offices—private offices of physicians and lawyers, of trade unions and other organizations, of business and scientific enterprises—then indeed it would constitute a sudden and drastic break with the whole history of the Fourth Amendment and its applications by this Court." 328 U. S. at 596.[5]

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[5] Though the premises involved here were used for commercial purposes, they were in fact "maintained as locked premises by defendant, and inaccessible to anyone except the defendant" (*supra*, p. 4).

The ordinance at issue here, in its breadth and absence of limitations, is not unlike the ordinance in *Eaton* v. *Price*, 364 U. S. 263 (1960), which permitted inspections by Housing Inspectors without a warrant, without probable cause or suspicion, and not as part of a systematic area-by-area search or periodic inspection. The decision of the Ohio Supreme Court upholding the ordinance's constitutionality was affirmed by an evenly divided court. The Supreme Court of Washington relied partially on *Eaton* to support its decision.

Taken together, *Frank* and *Eaton* still leave open the precise question presented in this case: *Frank*, because its ordinance, which required probable cause, is substantively different than the one at bar; *Eaton*, because affirmance by an equally divided court does not supply the rationale upon which the affirmance rests. As Mr. Justice Clark noted, the status of *Eaton* and *Frank* is "confused". *Eaton* v. *Price*, 360 U. S. 246, 250 (1959). Therefore, jurisdiction should be noted in order to consider the substantial federal question whether the Fourth and Fourteenth Amendments allow state officials to rummage freely about private business premises in the complete absence of reason to believe or suspect the presence of any condition towards which the inspection is directed. We believe that affirmance of the judgment below would reduce the protection against unreasonable searches "to the vanishing point." *Eaton* v. *Price*, 364 U. S. at 269.

2. *Frank v. Maryland Should Be Overruled.*

It has been approximately seven years since *Frank* v. *Maryland*, *supra*, was decided by a 5 to 4 decision of this Court, and since *Ohio ex rel. Eaton* v. *Price*, *supra*, decided two weeks later, underscored the Court's sharp disagreement in *Frank*. In the intervening years, decisions of this

Court have cast substantial doubt on the continuing viability of the indulgent view of the Fourth Amendment reflected in *Frank* and *Eaton*. See, e.g., *Marcus* v. *Property Search Warrant*, 367 U. S. 717 (1961); *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Ker* v. *California*, 374 U. S. 23 (1963); *Stoner* v. *California*, 376 U. S. 483 (1964); *Beck* v. *Ohio*, 379 U. S. 89 (1964); *Stanford* v. *Texas*, 379 U. S. 476 (1965).

In a world where "politically controlled officials have grown powerful through an ever increasing series of minor infractions of civil liberties" (*Frank, supra,* at 382), it is not too early to review afresh all of the implications inherent in *Frank*. In brief, appellant seeks reversal of *Frank* as an unwarranted and dangerous intrusion upon the Fourth Amendment.[6]

CONCLUSION

For the reasons stated above, jurisdiction should be noted.

Respectfully submitted,

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[6] The problem is not isolated. See the jurisdictional statement filed recently in *Camara* v. *San Francisco Municipal Court*, No. 1139.

APPENDIX

Opinion of the Supreme Court of the State of Washington

BARNETT, *J.**—This case involves the fire code of the city of Seattle and is before the court upon stipulated facts. The defendant is the owner of a warehouse located in Seattle. The warehouse is maintained as locked premises and is inaccessible to anyone except the defendant.

On or about February 14, 1963, the Seattle Fire Department, through its authorized representative, demanded of the defendant that an inspection be allowed as to the locked premises. The fire department did not procure a search warrant nor present such to the defendant, and no claim was made that the fire department *had any reasonable cause to believe a violation of the ordinance existed at the time of the demand.* The defendant refused to allow the fire department to make the inspection.

Action was brought by the city against defendant by reason of the latter's refusal to submit to the fire inspection. A jury was waived and the case was tried on the stipulated facts in the Superior Court of King County. Defendant was found guilty and fined by the court $100 suspended.

Pertinent sections of the Fire Code, Seattle Ordinance 87870, follow:

Section 8.01.010:

> Intent. This Title, referred to as the Fire Code, prescribes minimum standards for the safeguarding of life and property from the hazards of fire and explo-

* Judge Barnett is serving as a judge pro tempore of the Supreme Court pursuant to Art. 4, § 2(a) (amendment 38), state constitution.

sion arising from the storage, handling and use of hazardous substances, materials and devices, and from conditions hazardous to life or property in the use or occupancy of buildings or premises. Hazards which are governed by specific reference shall also be subject to all other applicable provisions of this Title.

Section 8.01.050:

Inspection of building and premises. It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, *except the interiors of dwellings,* as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards. (Italics ours.)

Section 8.01.120:

Definitions. .... "DWELLING" means a building occupied exclusively for residence purposes and having not more than two (2) dwelling units or as a boarding or rooming house serving not more than fifteen (15) persons with meals or sleeping accommodations or both.

Section 8.01.140:

Penalty. Anyone violating or failing to comply with any provision of this Title or Lawful order of the Fire Chief pursuant hereto shall upon conviction thereof be punishable by a fine not to exceed Three Hundred Dollars ($300.00) or imprisonment in the City Jail for a period not to exceed ninety (90) days, or by both such

fine and imprisonment, and each day of violation shall constitute a separate offense.

We are dealing here with a warehouse and business premises. It will be noted that § 8.01.050 specifically excepts the interiors of dwellings and consequently the same may not be inspected against the owner's will without a warrant. It should also be noted that we are not concerned here with the seizure of evidence for use in court and there is no threat of a criminal penalty even if a fire hazard were detected. Under the sections of the ordinance noted above, the fire chief is made responsible for enforcing the code.

It is first contended that § 8.01.050 is not sufficiently clear in statement and meaning to, in fact, give authority to the fire chief to enter all buildings and premises without any showing of reasonable or probable cause. We disagree.

The above is clear and unambiguous. It gives authority to the fire chief or his representative to enter commercial premises for purposes of inspection without any showing of reasonable or probable cause. No provision is made for securing a search warrant. A suspicion of violation of the ordinance is not a precondition to the inspection under the ordinance. Nor can it be suggested that the city exceeded its authority by the adoption of this ordinance. The enactment of reasonable ordinances regulating the inspection of buildings for fire hazards and procedures for forced elimination of fire hazards is within the police power of a municipality. *Everett* v. *Unsworth,* 54 Wn. 2d 760, 344 P. 2d 728 (1959).

Since a search warrant is not required, we are immediately confronted with the question whether the ordinance is in violation of U. S. Const. amend. 4 and Const. art. 1, § 7.

The Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Const. art. 1, § 7 states:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

The above provisions in the United States and State Constitutions, although they vary slightly in language, are identical in purpose and substance. *State* v. *Miles,* 29 Wn. 2d 921, 190 P. 2d 740 (1948). It is only unreasonable searches and seizures, made without probable cause, that are forbidden. *State* v. *Thomas,* 183 Wash. 643, 49 P. 2d 28 (1935).

In deciding the precise question, we recognize that the numerous federal and state cases including our own that were cited are not apposite. The cases usually involve the authority to inspect which attaches when some type of regulated activity is undertaken, *e.g.,* engaging in certain types of business affected with a public interest and, hence, subject to the police power of the state. See Davis, Federal Searches and Seizures § 9.2; and 4 Wharton's Criminal Law and Procedure § 1532 (Anderson ed. 1957); *State* v. *McFarland,* 60 Wash. 98, 110 Pac. 792 (1910), relating to the licensing and inspection of hotels; *Gange Lumber Co.* v. *Henneford,* 185 Wash. 180, 53 P. 2d 743 (1936), requiring taxpayers to furnish information as to their capital, debts,

earnings, etc.; *Kelleher* v. *Minshull*, 11 Wn. 2d 380, 119 P. 2d 302 (1941), authorizing access to the office and place of business of the individual and permitting an examination of the books, pertaining to the small loan business. These cases typify the sustained constitutionality of ordinances and statutes regarding inspection with which we have been concerned.

We are not here involved with a regulated activity giving rise to routine inspections. The question is whether a search without warrant, unjustified by suspicion of reasonable cause, is permitted.

Two cases recently decided by the Supreme Court of the United States are in point.

The first case is *Frank* v. *Maryland*, 359 U. S. 360, 3 L. Ed. 2d 877, 79 Sup. Ct. 804, argued March 5, 1959, and decided May 4, 1959. Therein it was held that the power to inspect dwelling places *either as a matter of systematic area-by-area search* or to treat a specific problem of rat infestation is of indispensable importance to the maintenance of community health. The court stated that this power would be greatly hobbled by blanket requirement of safeguards necessary for a search of evidence of criminal acts. It was held that the Baltimore ordinance providing that whenever the commissioner of health *shall have cause* to suspect that a nuisance exists in any house, cellar, or inclosure, he may demand entry therein in the daytime and if the owner or occupant shall refuse or delay to open the same and admit a free examination he shall forfeit and pay for every such refusal the sum of $20. Mr. Justice Frankfurter, speaking for the court, said, p. 366:

> The power of inspection granted by the Baltimore City Code is strictly limited, *more exacting than the analogous provisions of many other municipal codes.*

Valid grounds for suspicion of the existence of a nuisance must exist. Certainly the presence of a pile of filth in the back yard combined with the run-down condition of the house gave adequate grounds for such suspicion. The inspection must be made in the day time. Here was no midnight knock on the door, but an orderly visit in the middle of the afternoon with no suggestion that the hour was inconvenient. Moreover, the inspector has no power to force entry and did not attempt it. A fine is imposed for resistance, but officials are not authorized to break past the unwilling occupant.

. . .

The need to maintain basic, minimal standards of housing, to prevent the spread of disease and of that pervasive breakdown in the fiber of a people which is produced by slums and the absence of the barest essentials of civilized living, has mounted to a major concern of American government. The growth of cities, the crowding of populations, the increased awareness of the responsibility of the state for the living conditions of its citizens, all have combined to create problems of the enforcement of minimum standards of far greater magnitude than the writers of these ancient inspection laws ever dreamed. Time and experience have forcefully taught that the power to inspect dwelling places, *either as a matter of systematic area-by-area search* or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards *necessary for a search of evidence of criminal acts.* The need for preventive action is great, and city after city has seen this need

and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few. Certainly, the nature of our society has not vitiated the need for inspections first thought necessary 158 years ago, nor has experience revealed any abuse or inroad on freedom in meeting this need by means that history and dominant public opinion have sanctioned.

That there is "a total unlikeness" between "official acts and proceedings," *Boyd* v. *United States,* 116 U. S. 616, 624, for which the legal protection of privacy requires a search warrant under the Fourteenth Amendment, and the situation now under consideration is laid bare by the suggestion that the kind of an inspection by a health official with which we are concerned may be satisfied by what is, in effect, a synthetic search warrant, an authorization "for periodic inspections." If a search warrant be constitutionally required, the requirement cannot be flexibly interpreted to dispense with the rigorous constitutional restrictions for its issue. A loose basis for granting a search warrant for the situation before us is to enter by way of the back door to a recognition of the fact that by reason of their intrinsic elements, their historic sanctions, and their safeguards, the Maryland proceedings requesting permission to make a search without intruding when permission is denied, do not offend the protection of the Fourteenth Amendment. (Italics ours.)

Frank establishes the proposition that reasonable administrative searches may be conducted without search warrants.

The other case is *Ohio ex rel. Eaton* v. *Price,* 360 U. S. 246, 3 L. Ed. 2d 1200, 79 Sup. Ct. 978. That decision was ap-

pealed from the Ohio Supreme Court and decided June 8, 1959. The defendant owned and resided in a private residence in Dayton, Ohio. Three housing inspectors sought admittance to his home pursuant to a city ordinance which authorized them to enter any dwelling at a reasonable hour and upon showing proper identification for the purpose of inspecting the dwelling to determine if it conformed to the minimum standards of health and safety. The inspectors gave no reason or cause for the particular inspection, but merely told the defendant that they had a right to inspect any home.

Defendant was subsequently served with a warrant to appear in court for violation of the ordinance, which violation could result in a fine or imprisonment or both. As he was unable to provide bail, he was jailed. Eaton, an attorney, filed a petition for a writ of habeas corpus in the state court of common pleas against the chief of police. That court found the ordinance unconstitutional. It was reversed by the Ohio Court of Appeals.

The Ohio Court of Appeals (Montgomery County) in November, 1957, in *State ex rel. Eaton* v. *Price*, 105 Ohio App. 376, 152 N. E. 2d 776, affirmed, 168 Ohio St. 123, 151 N. E. 2d 523 (1958), held that an ordinance which establishes minimum standards for dwellings, authorizes a housing inspector "to enter, examine and survey at any reasonable hour" same, and which provides penalties for violation thereof, was not arbitrary, discriminatory, or unreasonable. The Ohio court said that it is a valid exercise of the police power and that the inspection contemplated by such ordinance is not violative of the Ohio Constitution prohibiting "unreasonable searches." The court said, p. 391:

> After giving due consideration to the rulings in the cited cases and the applicable principles of law, we are

> of the opinion that in the instant case the inspection is a routine matter; it is to be made during reasonable hours and is primarily for protective and not punitive purposes, and is in the interest of the general welfare. The inspection contemplated by the ordinance is not an "unreasonable search" within the meaning of the provision prohibiting "unreasonable searches and seizures" . . .

On appeal to the United States Supreme Court, the decision of the Ohio court was affirmed by an equally divided court. The court stated that the facts in *Eaton* were similar to those in *Frank* and that it would be a manifestation of disrespect to allow the *Frank* case to be overruled so shortly after it was decided.[1]

Although, in affirming *Eaton,* the first group of justices stated that the facts in *Eaton* are similar to those in *Frank,* it should be noted that *Frank* held valid an ordinance authorizing a search by a health inspector without a warrant, if there were reasonable grounds for believing the house was below the minimum standards of health and safety. The ordinance in *Eaton* did not provide for any grounds or reasons for a search and, thus, would permit systematic area-by-area inspection, whereas, in *Frank,* it permitted inspection to treat a specific problem. We are reminded that Mr. Justice Frankfurter stated in *Frank* that area-by-area inspections are indispensable.

The above cases deal with a man's castle—his home. In the instant case, we are concerned with a warehouse and business property. The ordinance in question excepts the "interior of dwellings."

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[1] Mr. Justice Stewart declined to sit on the case because his father was serving on the Supreme Court of Ohio when the case came before the court.

This case does not involve the search of evidence for criminal acts, but even the safeguards necessary for *such* evidence are not so stringent with reference to premises other than a man's home or dwelling.

In Davis, Federal Searches and Seizures § 1.31, p. 8, it was observed:

> The requirements of the Fourth Amendment receive their strictest application when a dwelling house is involved in a search. This fact is based on the traditional concept of the sanctity of the home and the peaceful enjoyment of its privacy.

The United States Supreme Court has applied different standards of reasonableness to searches of dwellings than to places of business. *Davis* v. *United States,* 328 U. S. 582, 90 L. Ed. 1453, 66 Sup. Ct. 1256 (1946). The lower federal courts also reflect this attitude: "We realize, of course, that the fact that the premises are a residence requires stricter requirements of reasonableness." *Smith* v. *United States,* 254 F. 2d 751 (1958), *cert. denied* 357 U. S. 937, 2 L. Ed. 2d 1552, 78 Sup. Ct. 1388. "It seems to be generally agreed that the Amendment applies most importantly to searches of dwelling houses . . ." *United States* v. *Turner,* 126 F. Supp. 349 (1954). "What may be unreasonable in a search of a man's house, may be entirely reasonable in a search of his place of business." *Giacona* v. *United States,* 257 F. 2d 450 (1958), *cert. denied* 358 U. S. 873, 3 L. Ed. 2d 104, 79 Sup. Ct. 113.

The dissenting opinion in *Frank, supra,* deals primarily with the homeowner. It is there stated, p. 374:

> The decision today greatly dilutes the right of privacy which every homeowner had the right to believe was part of our American heritage.

> The question in this case is whether a search warrant is needed to enter a citizen's home to investigate sanitary conditions. The Court holds that no search warrant is needed, that a knock on the door is all that is required, that for failure of the citizen to open the door he can be punished.

It is reasonable to believe that even the minority in *Frank* and *Eaton* would reach a different conclusion and apply different standards of reasonableness to a fact pattern such as that in the case at bar. A home is not involved in the instant case. A related issue is the knowledge gained by the inspection for possible use in any subsequent criminal cases. That is a question we do not pass upon at this time, since it is not before us. The ordinances in question authorize the fire chief to "enter all buildings and premises except the interior of dwellings as often as may be necessary" for finding and correcting any conditions liable to cause fires. No criminal charge is to be made upon discovery of a fire hazard. The code provides instead that whenever the fire chief finds in any building or upon any premises dangerous or hazardous conditions he "shall order such dangerous conditions or material to be removed or remedied in such manner as may be specified." An "order for correction" is then served upon the owner or occupant of the premises. But it should be noted that an inspection in the present case was only for discovery of fire hazards. No evidence would be seized for use in court and there was no threat of criminal penalty even if fire hazards were detected.

Section 8.01.010 of the fire code, *supra,* prescribes minimum standards for the safeguarding of life and property in the use and occupancy of buildings other than dwellings. The purpose of the fire code inspections is to correct condi-

tions hazardous to life and property. The problem of keeping cities and their inhabitants free from explosions and fires is a serious task facing all fire departments. It is obvious that routine inspections are necessary to insure the safeguarding of life and property. The need to conduct routine inspections of commercial premises, in regard to which probable cause for the issuance of a warrant could not ordinarily be established, outweighs the interest in privacy with respect to such premises. The purpose of the inspection contemplated by the code is not unreasonable.

There is no accepted yardstick for measuring the reasonableness of a search. What is reasonable is not determined by any fixed formula. The recurring questions of reasonableness of searches must find solution in the facts and circumstances of each case. This means the decided cases provide the only guidelines for determining the reasonableness of a search. See Davis, Federal Searches and Seizures; *United States* v. *Rabinowotz,* 339 U. S. 56, 94 L. Ed. 653, 70 Sup. Ct. 430 (1950).

In the light of *Frank* and *Eaton, supra,* we hold that the sanctions of U. S. Const. amend. 4 and Const. art. 1, § 7, have not been violated by the provisions of the Seattle Fire Code as herein set out.

Finally, it is urged by appellant that the ordinance is unconstitutional because it violates the equal protection clause of the U. S. Const. amend. 14, and the privileges and immunities clause, Const. art. 1, § 12, as well. These violations, it is contended, are the result of the "arbitrary and unreasonable" classification of all buildings into those having not more than two dwelling units and serving not more than 15 persons and that of every other type of building.

The guarantee of equal protection of the laws and the prohibition of special privileges and immunities require that class legislation apply alike to all persons within a class,

and reasonable ground must exist for making a distinction between those within and those without a specified class. *Clark* v. *Dwyer*, 56 Wn. 2d 425, 353 P. 2d 941 (1960). "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 489, 99 L. Ed. 563, 75 Sup. Ct. 461 (1955). Appellant does not suggest that that point has been reached in this case. The United States Supreme Court has, on another occasion, stated, "Equal protection does not require identity of treatment." *Walters* v. *City of St. Louis*, 347 U. S. 231, 237, 98 L. Ed. 660, 74 Sup. Ct. 505 (1954). The very act of classification involves some degree of discrimination. Equal protection "only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary." *Walters, supra.* There is remaining a wide area of legislative discretion.

We held in *State* v. *McFarland*, 60 Wash. 98, 110 Pac. 792 (1910), that a statute providing for the inspection of inns and hotels having 10 or more rooms was not an unreasonable classification and did not violate either state or federal constitution. There is not a great deal of distinction between *McFarland* and the case at bar.

"A statutory enactment cannot be successfully attacked unless the discrimination or inequality produced by the particular classification is manifestly arbitrary, unreasonable, inequitable and unjust. . . ." *State* v. *Persinger*, 62 Wn. 2d 362, 368, 382 P. 2d 497 (1963). Such has not been shown to be the circumstances in the instant case.

Judgment affirmed.

FINLEY, WEAVER, and HAMILTON, *JJ.*, concur.

ROSELLINI, *C.J.*, concurs in the result.

Remittitur

IN THE

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 37651

King County No. 38779

THE CITY OF SEATTLE,

Respondent,

—v.—

NORMAN E. SEE,

Appellant.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on November 24, 1965, became the final judgment of this court in the above entitled case on January 19, 1966. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Three Hundred Thirty-one and 07/100 ($331.07) Dollars in favor of respondent and against appellant.

The Petition for Rehearing was Denied by an Order filed January 19, 1966.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 19th day of January, A.D. 1966.

WILLIAM M. LOWRY
Clerk of the Supreme Court,
State of Washington

cc: COURT REPORTER
ABBOTT & CURTIS
MR. ANDREW CURTIS, JR.

HON. A. L. NEWBOULD
MR. JERRY F. KING
MR. JORGEN G. BADER

AMERICAN CIVIL LIBERTIES UNION
MR. PAUL D. JACKSON

Supreme Court

October Term, 1915

Norman Sue, Appellant,

vs.

The City of Seattle, Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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The City of Seattle

[illegible]

No._____

In The
Supreme Court of the United States

OCTOBER TERM 1966

NORMAN SEE, *Appellant,*

vs.

THE CITY OF SEATTLE, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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In The
Supreme Court of the United States

OCTOBER TERM 1966

NORMAN SEE,	*Appellant,*
VS.	
THE CITY OF SEATTLE,	*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

The appellee, The City of Seattle, moves the court to dismiss the appeal herein on the ground that it does not present a substantial federal question, or in the alternative affirm the judgment of the Supreme Court of the State of Washington on the ground that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

STATEMENT

This action was brought by the appellee, The City of Seattle, against appellant by reason of appellant's refusal to admit a fire inspector into his warehouse, a business property, for an inspection for fire and explosion hazards

pursuant to the provisions of the Seattle Fire Code, Ordinance No. 87870.

ARGUMENT

It is submitted that the decision of the Supreme Court of the State of Washington sustaining appellant's conviction for refusing to permit such inspection is entirely correct, *Seattle v. See*, 67 W.D.2d 465, 408 P.2d 262.

The cases of *Frank v. Maryland*, 359 U.S. 360, 3 L Ed. 877, 79 Sup. Ct. 804, and *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 3 L Ed.2d 1200, 79 Sup. Ct. 978, which upheld inspections of *private residences*, rather than warehouses, are dispositive of appellant's Jurisdictional Statement and compel dismissal of the appeal or affirmance of the judgment herein.

In the *Frank* case a conviction was sustained under a Baltimore ordinance which authorized the health officer to demand entry to "any house, cellar or enclosure" either as a matter of systematic area by area search or to treat a specific problem of rat infestation whenever he had cause to suspect that a nuisance existed.

By Justice Frankfurter the court stated, "Inspection without a warrant as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law has antecedents deep in our history." At page 372 the court continued:

"The power here challenged rests not only on a long history of its exercise. It is a power which was continually strengthened and applied to wider concerns through the very years when the right of individuals to be free from peremptory official invasion received increasing legislative and judicial protection. . . . The growth of cities, the crowding of populations, the increased awareness of the responsibility of the state for the living conditions of its citizens, all have combined to create problems of the enforcement of minimum standards of far greater magnitude than the writers of these ancient inspection laws ever dreamed. Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health, a power that would be greatly hobbled by the blanket requirements of the safeguards necessary for a search of evidence of criminal acts. . . . Certainly, the nature of our society has not vitiated the need for inspections first thought necessary 158 years ago, nor has experience revealed any abuse or inroad on freedom in meeting that need by means that history and dominant public opinion have sanctioned."

In *Ohio ex. rel. Eaton v. Price*, 360 U.S. 246, 3 L Ed. 1200, 79 Sup. Ct. 978 (1959), the defendant had been convicted of violating a city ordinance by refusing to admit three housing inspectors into his *home* to check for compliance with minimum health and safety standards. An entire neighborhood was there being investigated and inspected as part of a blanket program. Neither a search warrant nor a showing of probable cause was required.

Two state court opinions have followed *Frank* and *Eaton*: *City of St. Louis v. Evans*, 337 S.W.2d 948 (Mo. 1960) and *Camera v. Municipal Court of City and County of San Francisco*, 46 Cal. Rept. 585 (1965); see also *Dederick v. Smith*, 184 Atl. 595 (N.H. 1936); *Hubbell v. Higgins*, 126 N.W. 914 (Iowa 1910). In *Givner v. State*, 124 A(2d) 764 (Md. 1950), the court upheld a right of access to each of three inspectors, from city health, building and fire departments, stating at p. 775:

> "(T)hese inspections are of a routine nature, are to be made at reasonable hours, and are primarily for protective, not punitive purposes. In these circumstances, we consider these inspections reasonable."

The Washington State Supreme Court in making its decision carefully considered the question whether the inspection for fire hazards authorized by Ordinance 87870 contravenes the prohibition of the United States Constitution against unreasonable searches and seizures, and in deciding that it did not, made the following pertinent observations:

> "This case does not involve the search of evidence for criminal acts, but even the safeguards necessary for *such* evidence are not so stringent with reference to premises other than a man's home or dwelling.
>
> "The United States Supreme Court has applied different standards of reasonableness to searches of dwellings than to places of business. *Davis v. United State*, 328 U.S. 582, 90 L.Ed. 1453, 66 Sup. Ct. 1256 (1946)." (*Seattle v. See*, 67 W.D.2d 465, 473; 408 P.2d 262, 267)

"The ordinances in question authorize the fire chief to 'enter all buildings and premises except the interior of dwellings as often as may be necessary' for finding and correcting any conditions liable to cause fires. No criminal charge is to be made upon discovery of a fire hazard. The code provides instead that whenever the fire chief finds in any building or upon any premises dangerous or hazardous conditions he 'shall order such dangerous conditions or material to be removed or remedied in such manner as may be specified.' An 'order for correction' is then served upon the owner or occupant of the premises. But it should be noted that an inspection in the present case was only for discovery of fire hazards. No evidence would be seized for use in court and there was no threat of criminal penalty even if fire hazards were detected.

"Section 8.01.010 of the fire code, *supra*, prescribes minimum standards for the safeguarding of life and property in the use and occupancy of buildings other than dwellings. The purpose of the fire code inspections is to correct conditions hazardous to life and property. The problem of keeping cities and their inhabitants free from explosions and fires is a serious task facing all fire departments." (*Seattle v. See*, 67 W.D.2d 465, 474, 475; 408 P.2d 262, 267, 268)

It is interesting to note that the appellant does not question the propriety of the safety standards imposed by the Seattle Fire Code or the desirability of implementing a comprehensive fire prevention program through regular and routine inspections of commercial premises which are frequently used for the storage of combustible materials.

The ordinance in question regulating the inspection of buildings for fire hazards and establishing procedures

for the forced elimination of such hazards, is clearly within the municipal police power under Art. XI, Sec. 11 of the Washington Constitution which empowers municipalities to enact ordinances for the protection of the public health and safety. *Everett v. Unsworth*, 57 Wn.2d 760, 344 P.2d 729 (1959). Fire regulations are a classic example of such legislation. Seattle has had a Fire Code since its beginning and since at least 1889 has provided for inspections such as are here questioned. See *Seattle v. Hinckley*, 40 Wash. 468, 82 Pac. 747, upholding a requirement that all buildings within a certain area be supplied with fire escapes.

In practice, inspection of commercial buildings is a routine everyday occurrence, consisting simply of a visit and a tour by an experienced fire inspector of the Seattle Fire Department, and in 1962, as an example, 16,000 such inspections were made. These inspections have resulted in a substantial decrease in fire hazards and, therefore, in fire loss. Seattle occupies an enviable position in this regard since its annual per capita fire loss has consistently been a fraction of the national per capital fire loss, e.g. $2.26 in 1962 as opposed to the national per capita loss of $7.19. The National Fire Prevention Association made a study of over 2,000 fires from 1953 to 1961 and reported in the Fire Protection Handbook, 12th Ed., 1962, pages 1-32 to 1-35 that the major contributing causes of such fires were structural defects, improper handling and storage of combustible contents,

and weaknesses in private fire protection devices. These deficiencies could have been discovered by inspection and corrected by proper fire prevention practices. The importance of an effective fire prevention program cannot be over-emphasized and, as stated by the Washington court:

> "It is obvious that routine inspections are necessary to insure the safeguarding of life and property. The need to conduct routine inspections of commercial premises, in regard to which probable cause for the issuance of a warrant could not ordinarily be established, outweighs the interest in privacy with respect to such premises. The purpose of the inspection contemplated by the code is not unreasonable." (*Seattle v. See*, 67 W.D.2d 465, 475; 408 P.2d 262, 268)

Appellant's argument in support of jurisdiction herein which is set forth at pages 5 to 9 of his Jurisdictional Statement is to the effect 1.) that *Frank v. Maryland*, 359 U.S. 360, 3 L.Ed.2d 877, 79 Sup. Ct. 804, is not in point since the power of inspection in that case was "strictly limited"; 2.) that the court below improperly relied on *Davis v. United States*, 328 U.S. 582, 90 L.Ed. 1453, 66 Sup. Ct. 1256 (1946) in observing that this court has applied different standards of reasonableness to searches of dwellings than to places of business; and 3.) that the *Frank* case should be overruled. These points will be considered in the order stated.

The power of inspection granted by Ordinance 87870 in the case at hand is limited in many of the same ways as the Baltimore ordinance under consideration in the

Frank case, which, as Justice Frankfurter observed at p. 336 of the decision, was "more exacting than the analagous provisions of many other municipal codes." As to the points of similarity, an inspection under the Seattle Fire Code, as under the Baltimore ordinance, is merely conducted "to ascertain the existence of evils to be corrected upon due notification, or in default of such correction, to be made the basis of punishment" (*Frank v. Maryland*, 359 U.S. 360, 362) and, as in the *Frank* case, entry cannot be forced in the face of a refusal of inspection by the occupant. Although there is no "daytime" inspection restriction in the Seattle ordinance it could well be that one was not considered necessary since dwellings are not covered and most other premises are only occupied in the daytime anyway. The Baltimore ordinance required grounds for suspecting the existence of a nuisance as a basis for inspection, but it must be borne in mind that a private dwelling was there involved and that stricter requirements of reasonableness are applied to searches of dwellings than to places of business. As stated in Davis, Federal Searches and Seizures, § 1.31, p. 8:

> "The requirements of the Fourth Amendment receive their strictest application when a dwelling house is involved in a search. This fact is based on the traditional concept of the sanctity of the home and the peaceful enjoyment of its privacy."

Appellant seeks to evade the effect of this observation by quoting at page 7 of its brief from the *dissent* in *Davis*

v. United States, 328 U.S. 582, 90 L.Ed. 1453, 66 Sup. Ct. 1256 (1946), a case in which the court upheld a conviction for unlawful possession of gasoline rationing stamps seized in a search of defendant's station, and noted the difference between a private residence and a place of business in distinguishing an unlawful search and seizure case involving a private residence.

Finally, appellant at page 9 of his brief states that he "seeks reversal of *Frank* as an unwarranted and dangerous intrusion upon the Fourth Amendment," apparently tacitly conceding that *Frank,* unless overruled, requires dismissal of this appeal or affirmance of the judgment entered herein. However, aside from his conclusion that the *Frank* case is an "unwarranted and dangerous intrusion," the only reason advanced by appellant for overruling that decision is that it has been seven years since *Frank* and *Eaton* were decided and that

> "In the intervening years, decisions of this Court have cast substantial doubt on the continuing viability of the indulgent view of the Fourth Amendment reflected in *Frank* and *Eaton,* See, e.g., *Marcus v. Property Search Warrant,* 367 U.S. 717 (1961); *Mapp v. Ohio,* 367 U.S. 643 (1961); *Ker v. California,* 374 U.S. 23 (1963); *Stoner v. California,* 376 U.S. 483 (1964); *Beck v. Ohio,* 379 U.S. 89 (1964); *Stanford v. Texas,* 379 U.S. 476 (1965)."

The problem with this contention is that none of the above cited cases are in point in the case at hand. *Beck* and *Stoner* involved unlawful criminal searches; *Marcus* involved the constitutionality of procedures relating to

the sizure of allegedly obscene publications; *Mapp* applied the exclusionary sanctions of the Fourth Amendment to state cases; *Ker* involved the validity of an arrest and search in a possession of marijuana prosecution; and *Stanford* involved a search of the defendant's private residence and seizure of books and papers found therein pursuant to the Texas "Suppression Act." *Frank v. Maryland* is not even mentioned in *Beck* and *Stoner*, and the references to the *Frank* decision, and principally to its dissent, contained in the other cases, in no way cast "substantial doubt on the continuing viability" of that decision and are for the most part rather general allusions thereto.

CONCLUSION

It is submitted that under *Frank v. Maryland*, 359 U.S. 360, 3 L.Ed. 877, 79 Sup. Ct. 804 and *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 3 L.Ed.2d 1200, 79 Sup. Ct. 978, the Seattle Fire Code, Ordinance 87870, constitutes a reasonable exercise of the municipal police power in seeking to provide for the discovery and correction of fire hazards by means of the inspection of premises other than dwellings, and that such inspection is not violative of either the Fourth Amendment of the United States Constitution or Article I, § 12 of the Washington State Constitution.

The appeal should be dismissed or the judgment below affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1966

No. 180

NORMAN SEE,

Appellant,

—against—

CITY OF SEATTLE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR APPELLANT

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IN THE

Supreme Court of the United States

October Term, 1966

No. 180

NORMAN SEE,

Appellant,

—against—

CITY OF SEATTLE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR APPELLANT

Opinion Below

The opinion of the Supreme Court of the State of Washington is unofficially reported at 67 Wash. Decisions 2, No. 9, pages 465-476 (1966). It is set forth in the record at pp. 17-29.

Jurisdiction

Appellant's conviction was sustained on appeal by the Supreme Court of the State of Washington on November 24, 1965. A Petition for Rehearing was denied on January 19, 1966 (R. 29). Notice of Appeal was filed in the Supreme Court of the State of Washington on April 8, 1966

(R. 31). The Jurisdictional Statement was filed on May 27, 1966 and probable jurisdiction was noted on October 10, 1966 (R. 33). The jurisdiction of this Court rests upon 28 U. S. C. 1257(2).

Questions Presented

1. Whether Ordinance No. 87870 of the City of Seattle, Washington, which authorizes the inspection of buildings and premises by the Fire Chief, for the safeguarding of life and property from the hazards of fire and e plosion, without either a warrant or probable cause to believe a violation of the ordinance exists, violates the Fourth and Fourteenth Amendments to the United States Constitution.

2. Whether *Frank* v. *Maryland*, 359 U. S. 360 (1959), should be overruled.

Statute Involved

Seattle Ordinance No. 87870

Section 8.01.010:

Intent. This Title, referred to as the Fire Code, prescribes minimum standards for the safeguarding of life and property from the hazards of fire and explosion arising from the storage, handling and use of hazardous substances, materials and devices, and from conditions hazardous to life or property in the use or occupancy of buildings or premises. Hazards which are governed by specific reference shall also be subject to all other applicable provisions of this Title.

Section 8.01.050:

Inspection of building and premises. It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards.

Section 8.01.120:

Definitions. . . . "DWELLING" means a building occupied exclusively for residence purposes and having not more than two (2) dwelling units or as a boarding or rooming house serving not more than fifteen (15) persons with meals or sleeping accommodations or both.

Section 8.01.140:

Penalty. Anyone violating or failing to comply with any provision of this Title or lawful order of the Fire Chief pursuant hereto shall upon conviction thereof be punishable by a fine not to exceed Three Hundred Dollars ($300.00) or imprisonment in the City Jail for a period not to exceed ninety (90) days, or by both such fine and imprisonment, and each day of violation shall constitute a separate offense.

Statement*

That at all times mentioned herein, the defendant was and is the owner of certain premises at 1549 Northwest 49th Street, Seattle, King County, Washington, on which there is located a warehouse building, which premises were and are maintained as locked premises by defendant, and inaccessible to anyone except the defendant.

That on or about the 14th day of February, 1963, the City of Seattle Fire Department, through its authorized representative, demanded of the defendant that an inspection be allowed as to the said locked premises; that the said Fire Department did not procure a search warrant nor present such to defendant. That no claim was made that the said Fire Department had any reasonable cause to believe a violation of the ordinance existed at the time of the said demand. That the defendant, on said date, refused to allow the said Fire Department to make such inspection.

That on the 27th day of February, 1963, a warrant was issued for the arrest of the defendant for violation of City of Seattle Ordinance No. 87870, Section 8.01.050. That the cause proceeded to trial on the 15th day of March, 1963, upon a plea of not guilty, in Municipal Court before Judge Walter T. McGovern, and that defendant was adjudged guilty, appeal bond set at $100.00, which was paid, and appeal taken to Superior Court.

---

* The statement of facts is taken verbatim from the stipulation of facts agreed to by the parties in the King County Superior Court (R. 1-3).

In Superior Court, King County, appellant raised and argued the claim that Ordinance No. 87870 authorizes unreasonable searches in violation of the Fourth Amendment to the United States Constitution (R. 2-3) and that the ordinance violates the Fourteenth Amendment to the United States Constitution (R. 3). The same claims were raised and argued on appeal to the Supreme Court of the State of Washington where they were explicitly rejected on the merits.

Summary of Argument

I

Frank v. *Maryland,* 359 U. S. 360 (1959), is distinguishable from the case at bar. In *Frank,* unlike the present case, the ordinance required probable cause and probable cause was in fact present. The ordinance at bar requires neither a warrant nor probable cause to support an inspection. In addition, it authorizes searches at any time and as often as may be said to be necessary.

The court below, relying upon *Davis* v. *United States,* 328 U. S. 582 (1946), incorrectly held that Fourth Amendment standards vary as between private and commercial premises. *Davis,* however, turned not on that distinction, but rather on the difference between "*private* papers" and "*public* property." To construe *Davis* as did the court below, ignores the essential protection which the Fourth Amendment was designed to afford.

Any official search without probable cause is unreasonable. Exceptions to that rule are strictly limited to well-defined circumstances, all of which imply a strong element of probable cause.

II

Frank v. *Maryland, supra,* should be overruled for two reasons. First, it was based upon an artificial distinction between the right of privacy and the right of self-protection. The distinction is wholly unwarranted because the historical roots of the Fourth Amendment are embedded in the hostility to arbitrary government intrusions associated with the infamous writs of assistance and general warrants, both of which threatened privacy, not self-protection. Second, *Frank* departed from this Court's expansive interpretation of the Fourth Amendment extending from *Ex Parte Jackson,* 96 U. S. 727 (1877) and *Boyd* v. *United States,* 116 U. S. 616 (1886), through *Mapp* v. *Ohio,* 367 U. S. 643 (1961), and *Stanford* v. *Texas,* 379 U. S. 476 (1965).

ARGUMENT

I.

The Seattle Fire Code Ordinance authorizing Fire Department officials to enter and inspect private premises where no probable cause exists to suspect a violation of the Fire Code, without restriction as to time or number of searches, is repugnant to the Fourth Amendment, as incorporated by the Due Process Clause of the Fourteenth Amendment.

A. *Frank* v. *Maryland*, 359 U. S. 360 (1959), is distinguishable.

In *Frank* v. *Maryland*, the Court by a five-four vote sustained the constitutionality of a city ordinance which authorized daylight inspection of buildings and premises, without a warrant, by health department officers who had cause to suspect the existence of a nuisance that was a hazard to health.

Not only was probable cause explicitly required by the ordinance, it was clearly present in the case. 359 U. S. at 366. A health department officer's inspection, made pursuant to a complaint concerning the presence of rats in the area, revealed that Frank's house was in an "extreme state of decay" and that a substantial amount of rodent feces and debris had collected in the rear of the house.

Acting upon this tangible evidence, the health officer requested permission of Frank to inspect his basement, but was refused entrance. 359 U. S. at 361. Frank was found guilty of violating the ordinance which required

admission upon demand by an authorized official, and was fined twenty dollars.

In sustaining this conviction, Mr. Justice Frankfurter, speaking for the Court, said:

> The power of inspection granted by the Baltimore City Code is strictly limited, more exacting than the analogous provisions of many other municipal codes. *Valid grounds for suspicion of the existence of a nuisance must exist. Certainly the presence of a pile of filth in the back yard combined with the run-down condition of the house gave adequate grounds for such suspicion.* 359 U. S. at 366. (Emphasis added.)

Mr. Justice Whittaker, concurring, emphasized the significance of the existence of probable cause. He joined the Court's opinion upon

> being convinced that the health inspector's request for permission to enter petitioner's premises in midday [was] for the sole purpose of attempting *to locate the habitat of disease-carrying rodents known to be somewhere in the immediate area* . . . 359 U. S. at 373. (Emphasis added.)

The ordinance in the case at bar is not "strictly limited." On its face, and as construed and applied by the Supreme Court of Washington, the ordinance permits inspection of private premises, excluding the "interiors of dwellings," without a warrant and "without any reasonable or probable cause" to believe a violation of the ordinance existed at the time (R. 18).

The Seattle ordinance is devoid of any of the safeguards which the *Frank* Court found so significant. It dispenses

with the need for even a mere suspicion of the existence of an unwholesome or dangerous condition and establishes no restrictions as to place or duration of search. Presumably no room, alcove, closet or drawer is free from inspection. In addition, it authorizes searches to be conducted at any time, and as often as may be said to be necessary. An ordinance could scarcely be broader, or more susceptible to abuse of discretion.

In comparison, the Baltimore ordinance, as noted above, limited inspections to the "day time" and the Court in *Frank* recognized the fact that the search there involved "an orderly visit in the middle of the afternoon." Here the ordinance contemplates searches at any time, however unreasonable, notwithstanding the resultant inconvenience and burden on the private citizen. The fact that in the instant case there is no suggestion of an unreasonable time does not save the Seattle ordinance. For there is no guarantee against future midnight searches.

This Court has recently emphasized that it

> will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects. *Aptheker* v. *Secretary of State,* 378 U. S. 500, 515 (1964).

Statutes which "sweep unnecessarily broadly and thereby invade the area of protected freedoms," *NAACP* v. *Alabama,* 377 U. S. 288, 307 (1964), have been regularly condemned in the past. "[T]he power to regulate must be so exercised as not, in attaining a permissible end, unduly

to infringe the protected freedom." *Cantwell* v. *Connecticut*, 310 U. S. 296, 304 (1940).

If allowed to stand, the Seattle ordinance and thousands like it across the country open the door to unreasonable, arbitrary or politically motivated searches. As Mr. Justice Brennan has remarked in *Eaton* v. *Price*, 364 U. S. 263, 271 (1960) (dissenting opinion):

> It hardly contradicts experience to suggest that the practical administration of local government in this country can be infected with such [political and personal] motives. Building inspection ordinances can lend themselves to such abuse. We do not at all say this to be the case here . . . but that simply points up the issue.

Nor is it only the ordinance which distinguishes this case from *Frank*. The relevant facts here differ markedly as well. The Frank house was in a disreputable condition; appellant's premises evinced no suspicion of danger. Rats infested the Frank neighborhood; apparently no fire hazards were discernible in the area contiguous to appellant's warehouse. In short, while probable cause existed in *Frank*, the instant search was neither part of a routinized, regular inspection nor was it made pursuant to even a suspicion or complaint of a proscribed condition.

There is language in the prevailing opinion in *Frank* v. *Maryland*, *supra* at 372, that carries the possible implication that a systematic area-by-area search or the treatment of a specific manifest problem is justified not only without a warrant but even without probable cause. Looking at the opinion as a whole, such a reading is plainly improper

in view of its earlier emphasis upon probable cause. In addition it must be borne in mind that both an area search and the treatment of a specific problem may imply a degree of probable cause—the former because of general concern over a neighborhood condition, the latter because of some manifestation of a dangerous or harmful condition. Neither of these circumstances is presented in this case. Here there was an attempted naked invasion of privacy without any justification.

In light of the substantial distinctions between *Frank* and the instant case, *Frank* cannot be considered as controlling on this appeal. "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 357 (1931).*

B. The Court below misconstrued *Frank* v. *Maryland* and *Eaton* v. *Price* and applied an erroneous standard of reasonableness to searches of commercial premises.

The reliance of the Supreme Court of Washington upon the distinction between searches in dwellings as contrasted to commercial premises is wholly misplaced.

---

* In a companion case to *Frank, Eaton* v. *Price,* 364 U. S. 263 (1960), the Court affirmed by an equally divided Court, a ruling by the Supreme Court of Ohio upholding a search conducted by housing inspectors without probable cause. Since the Court divided equally, the ruling is without force as precedent. *Id.* at 264 (dissenting opinion). See also *The Antelope,* 10 Wheat. 66, 126 (1825); *Etting* v. *Bank of the United States,* 11 Wheat. 59, 78 (1826). More important, its authority is diminished by the fact that the case was not given the kind of plenary consideration which should support any decision affecting issues of far-reaching importance to constitutional liberties.

In finding the inspection authorized by the Washington ordinance to be within constitutional limits, the court below stated (R. 25):

> The United States Supreme Court has applied different standards of reasonableness to searches of dwellings than to places of business. *Davis* v. *United States*, 328 U. S. 582 (1946).

This statement is without foundation. In the first place, *Davis* turned not on the purported distinction between the nature of commercial premises and dwelling places, but on the fact that the case dealt "not with *private* papers or documents but with *public* property in the custody of a citizen." 328 U. S. at 589 (emphasis in original). See also *id.* at 587-91.* Secondly, as the dissenting opinion in the case recognized, it would "constitute a sudden and drastic break with the whole history of the Fourth Amendment and its application by this Court," if the decision were to be construed as suggesting that the Fourth Amendment protects homes and not places of business. *Id.* at 596. Finally, to interpret *Davis* as did the court below is to ignore the essential purpose of the constitutional protection. The Fourth Amendment was designed to protect private papers and personal effects which may be found as readily on business premises as in a home or on the person. Therefore, the premises here should stand in the same constitutional pos-

* The other factors stressed by the Court were the "public character of the property, the fact that the demand was made during business hours at the place of business where the coupons were required to be kept . . . the fact the initial refusal to turn the coupons over was soon followed by acquiescence in the demand . . . ", and the "ocular evidence that a misdemeanor had been committed . . . " 328 U. S. at 592-93. The case at bar is plainly distinguishable from *Davis* by the absence of these controlling factors.

ture as any other private place where such personal effects could reasonably be stored.*

C. A search conducted without probable cause is unreasonable and violative of the Fourth Amendment.

No case has been found in which this Court sanctioned a search, whether labeled "criminal" or "civil," under circumstances evidencing no probable cause for its undertaking. Likewise, the Court has never upheld a law such as the Seattle ordinance, which permits searches without a prior demonstration of probable cause. For the Court to sanction this major step beyond *Frank* would "reduce the protection of the householder 'against unreasonable searches' to the vanishing point." *Eaton* v. *Price, supra* at 269.

Probable cause is specifically required by the second clause of the Fourth Amendment. Exceptions which have been grafted on that Amendment in regard to the requirement of search warrants are strictly limited. None sanctions or contemplates action without probable cause. Thus a search and seizure may be effected without a warrant if incident to a legal arrest, *United States* v. *Rabinowitz*, 339 U. S. 56 (1950), if an officer has reasonable or probable cause to believe that an automobile which he has stopped contains contraband, *Carroll* v. *United States*, 267 U. S. 132 (1925), or if the exigencies of a particular situation compel immediate action, see *McDonald* v. *United States*, 335 U. S. 451 (1948); *Johnson* v. *United States*, 333

* There can be no dispute that the Fourth Amendment extends to a place of business as well as a home. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920); *Gouled* v. *United States*, 255 U. S. 298 (1921); *Go-Bart Importing Co.* v. *United States*, *supra*; *Lanza* v. *New York*, 370 U. S. 139, 143 (1962).

U. S. 10 (1948). These exceptional circumstances, by hypothesis, imply a strong element of probable cause.

The necessity for probable cause has been a recurrent theme in the decided cases. Its presence "emphasizes the purpose to protect against all general searches." *Go-Bart Importing Co.* v. *United States, supra* at 357. It prevents the issuance of warrants "on loose, vague or doubtful bases of fact." *Ibid.* Manifestly it should be required when a search warrant is not compelled.

The constitutional protections against unreasonable searches have their origin and justification in the preservation of the sanctity of one's premises and the privacy of his personal effects. This proposition has long been recognized.

> "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . ." *Boyd* v. *United States,* 116 U. S. 616, 630 (1886).

To be sure, the *Boyd, Go-Bart, Johnson, McDonald, Carroll* and *Rabinowitz* cases involved "criminal" searches. Even assuming that the validity of the decision in *Frank* that a warrant is not needed in "civil" searches, there is no basis in that case or in principle to vitiate the requirement of probable cause. This is not to say that the standards which must be met in establishing probable cause must necessarily be identical for "criminal" and "administrative" searches. What is necessary, however, is some degree of factual need for the search. Constitutional prece-

dent and the preservation of privacy mandate this conclusion.

Appellant does not dispute the need for providing official entry into private premises to inspect or search for health, fire or other hazards to public safety. Elimination of these dangerous conditions is a proper and desirable exercise of the state's police power, especially in light of increasingly rapid urbanization, industrialization and population expansion. But the vigorous enforcement of municipal codes and attack on urban decay can be conducted within constitutional strictures against invasion of privacy. The praiseworthy objectives of the Seattle regulations can be achieved under procedures which pay due regard to the guarantees of the Fourth and Fourteenth Amendments. Valid constitutional claims must be vindicated, even of only an "insignificant few" (359 U. S. at 372).

Health, housing and fire inspectors are not all benign, forebearing public servants. They too can be corrupt and arbitrary. The potential for abuse of discretion, by those who are not dedicated public servants, is enormous. Moreover, as Judge Prettyman noted in *District of Columbia* v. *Little,* 178 F. 2d 13, 17 (D. C. Cir. 1949), "the constitutional guarantee [of personal privacy] is not restricted to unimportant statutes and regulations or to malevolent or arrogant agents." And in his historic dissent in *Olmstead* v. *United States,* 277 U. S. 438 (1928), Justice Brandeis cautioned:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers.

> The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. 277 U. S. at 479.

To protect the public welfare is a commendable, indeed a mandatory, governmental function; but this cannot be achieved at the expense of individual liberties. To permit searches without probable cause, whether in the "criminal" or "administrative" area, would render a damaging blow to the constitutional protections of the Fourth and Fourteenth Amendments.

II.

Frank v. *Maryland* was incorrectly decided and should be overruled.

A. *Frank* was based upon an artificial distinction between the right of privacy and the right of self-protection.

The decision in *Frank* v. *Maryland,* 359 U. S. 360 (1959), is based upon an artificial division of the Fourth Amendment into the right of privacy and the right of self-protection. Although both are barriers against unreasonable searches and seizures, *Frank* finds that only the latter, concerned with criminal and forfeiture proceedings exclusively, requires issuance of a warrant.

The arbitrariness of this distinction between the right of privacy and that of self-protection becomes abundantly clear when we apply the very criteria enunciated in the decision:

> The second, and intimately related protection, is self-protection: the right to resist unauthorized entry which has as its design the securing of information to fortify

> the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property. 359 U. S. at 365.

Surely a fire inspection which has as its object that persons inspected conform their premises to certain norms, the failure of which can result in criminal penalties, is an application of "the coercive power of the state against the individual." Equally, if a violation is revealed and not remedied, the initial inspection has resulted in "information which may be used to effect a further deprivation of life or liberty or property."

This artificial distinction and resulting limitation upon the necessity for a search warrant is based on a misunderstanding of the history of the Fourth Amendment, including the old English case of *Entick* v. *Carrington,* 19 *Howell's State Trials,* col. 1029 (1765).

The Fourth Amendment has its roots in the hostility to the arbitrary government intrusions associated with the infamous general warrants and writs of assistance which, as pointed out in the Court's opinion in *Frank,* were generally aimed at the seizure of criminal evidence, and towards forfeitures. But they were not so limited. As indicated in *Quincy's Massachusetts Reports* 1761-72, at 395-98 (1865), they had other—"civil"—uses such as the collection of debts and the granting of preferences between creditors.

The view that privacy from government intrusion of any kind, either criminal or civil, is at the crux of the matter, is further supported by the fact that these general

warrants were often used to penalize so-called seditious libel and to suppress freedom of the press. See Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, in *The Johns Hopkins University Studies in Historical and Political Science*, ser. 55, no. 2 (1937); *Boyd* v. *United States*, 116 U. S. 616 (1886); *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961); *Stanford* v. *Texas*, 379 U. S. 476, 482-85 (1965). Thus searches and seizures were, and continue to be, intimately related to freedom of expression. *Entick* v. *Carrington*, *supra*, itself arose out of a search for evidence of seditious libel. It was this to which Mr. Justice Douglas referred when he said, dissenting in *Frank*, that "The Court misreads history when it relates the Fourth Amendment primarily to searches for evidence to be used in criminal prosecutions," and that "the Fourth Amendment thus has a much wider frame of reference than mere criminal prosecutions." 359 U. S. at 376-77. The roots of the Fourth Amendment go far deeper than the Court acknowledged in *Frank*. Recently, in *Stanford* v. *Texas*, 379 U. S. 476 (1965), the Court adopted Mr. Justice Douglas' view of the roots and scope of the Fourth Amendment when it quoted with approval the following from his dissent in *Frank*:

> "The commands of our First Amendment (as well as the prohibitions of the Fourth and the Fifth) reflect the teachings of Entick v. Carrington, supra. These three amendments are indeed closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.'" *Frank* v. *Maryland*, 359 U. S. 360, 376 (dissenting opinion). *Stanford* v. *Texas*, 379 U. S. 476, 484-85 (1965).

Once the history of the Fourth Amendment is seen to reflect a major concern for freedom of expression and human dignity it becomes evident that the motivating force behind the Fourth Amendment was not merely the fear of the arbitrary search for criminal evidence, but the general animosity towards governmental intrusions of any kind.

B. Cases subsequent to *Frank* v. *Maryland* have expanded the right of privacy and that aspect of it which falls within the Fourth Amendment should be held to require a warrant for an administrative search.

This Court, in cases subsequent to *Frank*, has enlarged the concept of privacy both in the Fourth Amendment area, and as a general constitutional right. The emphasis in Fourth Amendment cases is not merely on "privacy," but on its expanded concept, a concept in accord with concerns broader than, though sometimes couched in terms of, abhorrence of the search for criminal evidence. As indicated earlier, *Stanford* v. *Texas, supra,* spoke in terms of "human dignity." In *Silverman* v. *United States,* 365 U. S. 505, 511 (1961), the Court said, "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Again, in *Schmerber* v. *California,* 384 U. S. 757, 767 (1966), the Court said, "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." Surely these sentiments give "privacy" a far more important place in the scheme of the Fourth Amendment than acknowledged by the majority opinion in *Frank.* And in *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), privacy

was elevated to the status of a self-contained right not dependent upon any single clause or amendment in the Constitution, but rather on a "penumbra" of freedoms and rights surrounding various amendments to the Constitution.

As Professor Thomas Emerson observed:

> [P]rotection, in other words, of the dignity and integrity of the individual—has become increasingly important as modern society has developed. All the forces of a technological age—industrialization, urbanization, and organization—operate to narrow the area of privacy and facilitate intrusions into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society. Emerson, *Nine Justices in Search of a Doctrine,* 64 Mich. L. Rev. 219, 229 (1965).

C. *Frank* v. *Maryland* departed from this Court's expansive interpretation and application of the Fourth Amendment.

The expanding concept of privacy as discussed in the preceding section is consistent with the general trend to construe the Fourth Amendment broadly. This trend is consistent with the Court's landmark statement in *Boyd* v. *United States, supra.* In language peculiarly relevant to the encroachment upon the Fourth Amendment right permitted in *Frank,* the Court said:

> [B]ut illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to

> the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. 116 U. S. at 635.

This clear tendency to construe the Fourth Amendment expansively is demonstrated by a long line of cases in this Court. See, *e.g.*, *Gouled* v. *United States*, 225 U. S. 298, 304 (1921); *Byars* v. *United States*, 273 U. S. 28, 32 (1927); *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 357 (1931); *United States* v. *Lefkowitz*, 285 U. S. 452, 464 (1932).

The language of "liberal construction" was not mere rhetoric. It has been accompanied by holdings of equivalent breadth. In *Ex parte Jackson*, 96 U. S. 727 (1877), this Court held that letters and sealed packages in the mail come within the scope of the Fourth Amendment; in *Boyd* v. *United States, supra;* that a subpoena *duces tecum* to produce defendant's books and records in court violated the Fourth and Fifth Amendments; in *Weeks* v. *United States*, 232 U. S. 383 (1914), that illegally seized evidence must be excluded from the federal courts; in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920), that the Fourth Amendment was equally applicable to the poison fruit of illegally seized evidence, in *Gouled* v. *United States, supra*, that "mere evidence" was protected from seizures even with a warrant; in *Gouled* v. *United States, supra*, and *Go-Bart Importing Co.* v. *United States, supra*, that offices as well as private dwellings come within the protection of the

amendment; and in *Wolf* v. *Colorado*, 338 U. S. 25 (1949), that the Fourth Amendment was applicable to the states.

This trend continued even after the *Frank* case. In *Jones* v. *United States*, 362 U. S. 257 (1960), this Court relaxed the requirements for "standing"; in *Elkins* v. *United States*, 364 U. S. 206 (1960), it abrogated the silver platter doctrine; in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), it held that exclusion was an inextricable element of the Fourth Amendment and was therefore applicable to the states; and in *Ker* v. *California*, 374 U. S. 23 (1963), the standard of reasonableness was found to be the same under the Fourth and Fifteenth Amendments.

This history of broad construction of the Fourth Amendment was accompanied by a strict adherence to the necessity of obtaining a warrant prior to any search and seizure. The requirement of a warrant is based upon the value attached to the intervention of a neutral and detached magistrate or other judicial officer to determine the existence of reasonable grounds for the undertaking of a search. *Johnson* v. *United States*, 333 U. S. 10 (1948); *McDonald* v. *United States*, 335 U. S. 451 (1948). See also *Beck* v. *Ohio*, 379 U. S. 89 (1964). The only exceptions to the general requirement of such a warrant is in the case of a search incident to arrest, *Rabinowitz* v. *United States*, 339 U. S. 56 (1950), and in the case of a moving vehicle, *Carroll* v. *United States*, 267 U. S. 132 (1925). These deviations from the rule requiring a warrant for a search are grounded on obvious necessities. Just as in criminal cases such necessity should be the only basis for carving out exceptions to the requirement of a warrant in administrative searches. The *Frank* case accordingly is a dangerous precedent in permitting warrantless searches.

CONCLUSION

For all the reasons stated above, the judgment of the Supreme Court of Washington should be reversed and appellant's conviction vacated.

Respectfully submitted,

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December 1966

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908

No. 130

NORMAN SEE, *Appellant*,

vs.

CITY OF SEATTLE, *Appellee*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE APPELLEE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 180

NORMAN SEE, *Appellant,*

against

CITY OF SEATTLE, *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE APPELLEE

Opinion Below

The opinion of the Supreme Court of Washington is contained in 67 Wn. Dec. 2, No. 9, pp. 465-576 (1966). It is set forth in full in the Record at pages 17-29.

Jurisdiction

The decision of the Supreme Court of Washington was released November 24, 1965. R. 17. A petition for Rehearing was denied January 19, 1966. R. 29. Notice of Appeal was filed August 8, 1966. R. 31. The Jurisdictional Statement of Appellant was filed May 27, 1966 and probable jurisdiction was granted October 10, 1966. R. 33. The jurisdiction of this Court rests upon 28 U.S.C. 1257 (2).

Questions Presented

Where there is an undisputed legislative finding that the safety of persons and property requires city-wide, routine, periodic inspections of all buildings (except the interior of dwellings) to eliminate preventable fires and explosions, is the entry of a warehouse for such a purpose an unreasonable search and seizure which requires a Fourth Amendment Warrant issued by a judge upon a showing of probable cause?

Whether the fact that Appellant's building is a warehouse has any significance in answering this question?

Statement

Appellant prepared a stipulation to bring before the Court the facts he deems important to his claim. Perhaps of more importance is the indisputable legislative finding by Seattle's City Council that the safety of persons and property located in that city requires periodic, routine, fire and explosion prevention inspections of all buildings except the interior of dwellings.

The Ordinance fixes minimum standards for buildings and requires city-wide inspections "for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire" (sec. 8.01.050). In its preamble the Ordinance states that inspections are essential to safeguard:

> "... life and property from the hazards of fire and explosion arising from the storage, handling and use of hazardous substances, materials and devices, and from conditions hazardous to life or property in the use or occupancy of buildings or premises"

except the interior of dwellings.

This Ordinance names the specific fire and explosion hazards which it seeks to prevent and requires inspectors

to give written notice of the defects found upon inspection the elimination of which will prevent these hazards.

Unlike the regulations in *District of Columbia* v. *Little*, 339 U.S. 1; *Frank* v. *Maryland*, 359 U.S. 360; and *Eaton* v. *Price*, 364 U.S. 263, which covered health, fire and other hazards, this Ordinance is aimed strictly at named fire and explosion hazards. Unlike the regulations involved in those cases the Seattle Ordinance excepts the interior of dwellings from the periodic, routine city-wide inspections which it requires. Also, unlike those cases which involved dwellings, this case involves inspection of a warehouse presumably used for business or commercial purposes.

Appellant violated Seattle's Ordinance by refusing firemen entry to his warehouse which they sought as part of a routine, periodic city-wide inspection. He contends that a Fourth Amendment warrant issued by a judge upon evidence of probable cause is required for such an entry. Appellant also claims that such probable cause does not exist so no such warrant can issue. Thus the structural safety and combustionable or explosive contents of his warehouse must remain secret. The Trial Court and the Supreme Court of Washington both rejected Appellant's contention.

As found by the Council in enacting this Ordinance, actual experience in Seattle shows conclusively that an effective fire safety inspection program materially reduces the number of incidents of fire and the seriousness thereof when a fire does occur, thereby resulting in a lesser loss of life and property. Official experience supporting this finding is contained in Appendix A. In the year 1962, for example, notices of correction arose in approximately one of every ten inspections. See Appendix A.

Two additional benefits derive from a routine but intensive inspection program such as Seattle's. *First*, the

inspecting firemen are afforded the opportunity of educating building owners or occupants on the advantage of fire prevention programs. In addition, most owners and occupants are unaware of the minimum requirements of the ordinance and thus of the fire and explosion hazards which may exist on their premises. *Second,* in the case of larger structures or those with particularly hazardous contents, a fire fighting plan may be developed which is tailored to the particular use, available internal access, and the location and type of fire fighting equipment on the premises. It is well established that knowledge of and adequate egress for occupants and firemen, in case of a fire, is a major life saving factor and one for which the city bears a major responsibility. The ordinance specifies this. (R. 6, § 8.01. 060).

The effectiveness of Seattle's fire inspection and prevention program is evidenced by a per capita fire loss over the last eleven years of approximately one-third the national average. Even so, fire losses are on the increase. The figures are contained in Appendix A.

The legislative finding that fire safety and prevention inspections are necessary is not controverted. Nor is it disputed that such inspections protect not only the owner; his property and those who enter upon his premises (including firemen in case of fire) but the neighboring properties and persons therein and the public as a whole.

Summary of Argument

I

Finding that life and property in Seattle are endangered by substandard structure of buildings and improper storage of explosives and combustible materials, Seattle's City Council enacted an ordinance which seeks to prevent fires

and explosions by setting minimum standards for buildings and for inspections of all buildings, except interior of dwellings, to ascertain whether the standards are met. *In rem* in operation, the ordinance is aimed at defective property rather than people, providing penalties against the individual only after an owner or occupant fails to correct deficiencies set forth in writing by the inspector. It is not a crime under the ordinance to maintain a fire or explosive hazard. The maintenance of such a hazard *only* becomes a crime *after* the Fire Chief has served an order for removal or correction of such a hazard and that order is not complied with. Appellant denied an inspector entry to his warehouse under the ordinance claiming a Fourth Amendment warrant is required and that since no probable cause exists for the requested entry the structure and contents of his warehouse must remain secret. This is denied by Appellee.

II

Inspection of Appellant's warehouse as a part of a routine, periodic, city-wide fire and explosion prevention program is necessary to the performance of the City of Seattle's duty to protect life and property by eliminating preventable fires and explosions—the legislative basis for its ordinance. The Fourth Amendment's purpose is the protection of the privacy of individuals from unreasonable searches and seizures by public officials. It prohibits entry upon, or search and seizure of, property intimately connected with an individual without a Fourth Amendment warrant. A warehouse when located in a city of about 600,000, and thus becoming one of the buildings found to require routine, periodic, safety inspection, is not property so intimately associated with an individual as to make entry into the warehouse for such inspection a violation of the Fourth Amendment.

III

In view of the nature and purposes of a warehouse, it not being a building intimately connected with the life of an individual, the chances of the constitutional rights of an individual being invaded by a fire inspection are very small. The only rights involved in a warehouse establishment are private possessory rights which will be afforded protection, not jeopardized, by inspection to prevent fire and explosions.

Constitutional rights do not operate in a vacuum. Nowhere has Appellant identified any "person, house, papers or effects" or anything else he seeks to protect by claiming that the entry to his warehouse will be an "unreasonable" search and seizure under the Fourth Amendment.

IV

Actual experience demonstrates the importance of fire inspections in substantially reducing fire loss. To uphold Appellant's contention would, in effect, render his warehouse completely immune from fire inspection, and sanction the continued existence of any fire and explosion hazards therein in the midst of a heavily populated area. This is a risk Appellant may wish to take but he should not be permitted to impose the risk upon others for whose safety the city has a responsibility.

V

Application of the Fourth Amendment in the instant case may well give rise to a weakened and sophistic definition of probable cause. See Dissent in *Frank* v. *Maryland*, 359 U.S. 360, 383. Rarely will or could a meaningful showing of probable cause, as that term is understood in the criminal

context, be made. Yet the practical need for fire inspections and the actual absence of threat to individual liberties will encourage the issuance of warrants on a mere routine showing of lack of inspection for a certain period of time. Such a radical recasting of probable cause is dangerous to the real liberties the Fourth Amendment was designed to protect.

VI

Fire prevention is an essential governmental function and inspections for fire hazards are essential means of carrying out that function. The inspections entail no arrests, seizures, or imposition of criminal penalties. The Seattle Fire Code is preventative and corrective in nature and does not, as presently written and carried out, conflict with the Fourth Amendment.

VII

Frank v. *Maryland* while distinguishable from the instant case because a commercial warehouse is here involved in contrast to a dwelling, is basically sound, and should not be overruled.

ARGUMENT

I. The Seattle Fire Code Is Designed To Protect Life And Property In The City From The Elemental Danger Of Fire And Explosion And Its Operation Is Not Directed At The Individual Except To The Extent That He Refuses, After Written Notice, To Correct Or Eliminate Hazards Which Cause Fires Or Explosions.

Man lived in cities or towns for a long time before he developed effective means of preventing the fires which started in one structure from destroying the numerous structures which constituted the city. The history of the

middle ages is replete with city-wide fires. London was substantially destroyed by fire in 1666. See generally *Pepys' Diary.* New York was gutted by fire in 1835, Boston in 1872, Chicago in 1871, Baltimore in 1904, and Seattle in 1889. On June 6, 1889, a cabinet maker's glue pot boiled over on the shop's wood shavings. Within a few hours an explosive fire had set the entire Seattle business district ablaze. As a result of this fire the entire business center of the City was destroyed. See the *Post-Intelligencer,* June 7, 1889; Bagley, *History of Seattle,* (1916) pp. 419-428; and *Historic Fires of the West,* 1966, pp. 104-127.

Early in the history of this country preventative measures against city fires were taken. Thus in 1648, "Worshipful Fire Wardens" were inspecting New York dwellings to see if any mud had cracked off wooden chimneys and fireplaces. To end the indignities that these inspectors suffered from the housewives who jeeringly called them "Chimney Sweeps" the courts began to impose fines on any woman who failed to pay them proper respect. The Worshipful Fire Wardens were later replaced with "Viewers and Searchers of Hearths and Chimneys." Besides providing for inspection, early colonial law imposed a fine of fifteen shillings on "every person who shall suffer his house to be on fire." Another law directed each citizen to fill three of his leather buckets with water at sunset and place them on his door step for use in case of need. See Herbert Asbury, *Ye Olde Fire Laddies* (A. A. Knopf: 1930).

Eventually the sense of community responsibility gave rise to the volunteer fire departments. At the same time municipal ordinances were passed to reduce the possibility of uncontrolled fires by attempting to eliminate the conditions which were their cause. The Seattle Fire Code is a typical example of such an ordinance.

At issue in the instant case is the validity in the context

of the Fourth Amendment of Section 8.01.050 of the Seattle Fire Code providing for inspection of building and premises. That section provides:

> "It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards."

Immediately of note is the elimination of "the interiors of dwellings" from the provision. "Dwellings" are defined in Section 8.01.120:

> " 'Dwelling' means a building occupied exclusively for residence purposes and having not more than two (2) dwelling units or as a boarding or rooming house serving not more than fifteen (15) persons with meals or sleeping accommodations or both."

The wording of the ordinance reveals that it operates *in rem*. It does not set up a standard of conduct or proscribe activities of a person, rather, it is concerned solely with the physical conditions of innate structures and their physical (flammable, combustionable) contents which might cause fires or explosions. No mention of any person other than the Fire Chief is made in Section 8.01.050. In addition to this *in rem* operation, the section is not primarily concerned with an inspection for the purpose of prosecution for violation of the ordinance; rather, the purpose is the ascertainment of "any conditions liable to cause fire" so that they can be corrected.

The common sense preventative and correctional nature of the Seattle Fire Code is further illustrated in Section

8.01.060 dealing with Orders to Eliminate Dangerous and Hazardous Conditions. This section does not provide for the imposition of a penalty upon the citizen responsible for the hazardous condition, or for his arrest, or for the seizure of his property, but rather a remedy is set up to correct the condition. Again, the fact that the code is concerned not with regulating the activities of individuals, but rather with the conditions of innate structures and property is illustrated by the fact that the person who shall receive the order is not specified in Section 8.01.060. A specific individual feels the weight of the code only when he, through ownership or occupancy, assumes as a member of society responsibility for the structure inspected, a responsibility in return for which this owner or occupant enjoys the various rights and privileges entailed in our concept of private property.

In the pre-censorship cases, (cf. *Marcus* v. *Property Search Warrant*, 379 U.S. 717) the dangers of pre-censorship far outweigh the harm to the public, but here the dangers from entry must be laid alongside the irreparable damage in loss of life and property that can come from fire and explosion which entry might prevent. Here the ordinance is not aimed at crime. It is aimed at the saving of life and property.

A Fire Code has been in effect in Seattle from an early date and since at least 1884 it has included an inspection provision.[1]

If, as this Court suggests in *Frank* v. *Maryland*, 359 U.S. 360, 370, there is constitutional significance in "a long and consistent history of state practice," then the historical practice shows that inspections without warrant, other

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[1] Ordinance 59869 § 9-13, adopted 1930 (General Ordinances, City of Seattle 1936, p. 529-532); Ordinance 36299, approved 1916; Ordinance 17240 § 191, approved 1907 (Ordinances of the City of Seattle, 1869-1907, p. 394); Ordinance 536, division 2, § 4, approved 1884 (Ordinances of the City of Seattle, 1869-1884, p. 165).

than as a means of obtaining criminal evidence, have been an integral part of the police power of the City of Seattle since the birth of the State.

The Seattle Fire Code is a common sense attempt to deal with the elemental dangers of fire and explosion. It is concerned with correcting hazards which are caused or naturally occur through neglect, ignorance, deterioration in man-made structures and combustion of materials or unsafe storage of explosives, in order to prevent uncontrolled fires and explosions which if not prevented will destroy life and property, if not the entire city.

II. The Fourth Amendment Was Intended To Safeguard Entry To Those Buildings Which Are So Intimately Used By Individuals That The Buildings Must Be Protected From Unwarranted Governmental Intrusions In Order To Protect The Constitutional Liberties Of The Individual.

The Seattle Fire Code, in providing for periodic routine fire hazard inspections in non-dwelling structures without requiring a showing of probable cause or the obtaining of a warrant, does not violate the Fourth Amendment. That Amendment provides:

> "The right of the people to be secure in their *persons, houses, papers* and *effects*, against *unreasonable searches* and *seizures*, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." (italics supplied)

The meaning of the Fourth Amendment is apparent in its wording and in its history.

The Amendment speaks in terms of "persons, houses, papers, and effects". The term "house" is used. The purport of the wording of the Amendment is to throw a

protective wall around the dwelling house of the citizen, assuring to him privacy from governmental intrusion. The wording of the Amendment reveals the further purpose of protecting the "right of the people" in what ultimately amounts to their privacy against unwarranted intrusions by governmental authorities. It does not protect a building per se from governmental intrusion, just those buildings which are so intimately connected with the life of an individual, that in order to protect his constitutional liberties, it is necessary to throw a protective wall around the building involved. It is fair to infer that numerous buildings are not so intimately connected with an individual as to require this protection.

The history of the Amendment conclusively demonstrates the validity of this reading. The Amendment must be read against the background of the times in which it was adopted. *Entick* v. *Carrington,* 19 Howell's St. Tr. 1029 illustrates the abuses the Fourth Amendment was aimed at eliminating. That case involved an action in trespass brought by Entick, the alleged author of a seditious paper entitled *The Monitor or British Freeholder,* against four of the King's messengers in ordinary, who, armed with a general warrant signed by the Earl of Halifax, then one of King George III's principal secretarys of state, entered into Entick's house and searched it throughout, prying into and examining all the private papers, books and secret documents of Entick, and finally carting all of them away to be examined by Lord Halifax. The four messengers, in their defense, pleaded the general warrant to search and seize under which they had acted. Lord Camden, the Lord Chief Justice of the Court of Common Pleas rejected this defense:

> "... if this point should be determined in favor of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the

> search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel."

10 How. St. Tr. at 1063. See *Wilkes* v. *Wood*, 19 How. St. Tr. 1153 (1763).

While Lord Camden was writing in the context of a conflict between the government and the press, his decision reflects the presence of even more fundamental rights than those of political expression. From the times of the ancient Greeks, western man has recognized the sanctity of the home. Lord Chatham's famous speech to the effect that "the poorest man may, in his cottage, bid defiance to all the forces of the crown" recognizes this sanctity. It is obvious that a deserted cottage, or a cottage used solely for the storage of roots and potatoes would hardly enjoy this immunity from entrance, as all that would be involved would be property rights, which would not be jeopardized by a passing inspection or entrance by officers of the state. It has been said that "the spirit of the constitutional prohibition against unreasonable searches and seizures, has its source in the maxim that 'every man's house is his castle.'" Cooley, *Constitutional Law*, 300. Again, the maxim speaks of a 'house', not a factory or warehouse, which structures existed at the time the Bill of Rights was written.

In *Entick* v. *Carrington, supra* at p. 1066 Lord Camden also said:

> "The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, etc. are all of

this description; wherein every man by common consent gives up that right, for the sake of justice and the general good."

This Court has only applied the Fourth Amendment to buildings the search of which would, as a practical matter, jeopardize the constitutional liberties of an individual. In *Gouled* v. *United States*, 255 U.S. 298, a man's office was included within the purview of the Fourth Amendment; in *Taylor* v. *United States*, 286 U.S. 1, a garage immediately adjacent to a house was held within the protection, and in *Carroll* v. *United States*, 267 U.S. 132, the Court required a showing by the seizing officer that he had probable cause to believe liquor was being illegally carried in an automobile. In contrast, Mr. Justice Holmes, in *Hester* v. *United States*, 265 U.S. 57, held that open fields were not within the purview of the amendment. Mr. Justice Douglas in *Griswold* v. *Connecticut*, 381 U.S. 479, 484, recognized that essentially the Fourth Amendment along with the First and the Fifth, were designed to guarantee the privacy of the home against governmental intrusion.

In excluding dwellings from the provision of Section 8.01.050, the City of Seattle has substantially eliminated any possibility of conflict with the Fourth Amendment.

III. The Inspection Is A Reasonable Exercise Of The City's Police Powers

No facts are in the record before this Court to indicate whether the public officials were reasonable in their approach to Appellant. However, the absence of such facts does not warrant assumptions that the ordinance in question authorizes a factually unreasonable search. The rule ap-

plicable here is stated in *United States* v. *Raines* 363 U.S. 17, 21:

> "... This court as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, N.Y. & P.S.S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39, 28 L. ed. 899, 901, 5 S. Ct. 352."

There is no claim by Appellant that the City's fire inspectors attempted to abuse the inspection process. There is no justification for argument that the ordinance authorizes factually unreasonable inspections.

IV. The Probable Cause Criteria Of The Fourth Amendment Is Inapplicable To A Safety Inspection

The attempted entry and inspection of Appellant's warehouse here is pursuant to a duty imposed by ordinance upon the Fire Chief "to inspect * * * all buildings and premises, except the interior of dwellings, as often as may be necessary." The purpose for the enactment of such legislation and the authorization of entry to *all* commercial buildings is the proven frequency with which fire hazards exist therein and the serious consequences in the event of fire or explosions. Judicial inquiry whether on an *ex*

parte or other application to a magistrate for a "search warrant" even if authorized by state law, could not conceivably work. Whether inspections for fire hazards are programmed annually or on an area wide basis, or are concentrated in frequency because of prevailing structural conditions in the vicinity or the nature of the occupancy or storage, are matters for administrative judgment and such inquiries are not peculiarly judicial in nature. To inject the judiciary as a hurdle to safety inspections is not warranted by any proof of injury to any private or public interest or right.

The criteria for the issuance of warrants by judges as set forth in *Mapp* v. *Ohio*, 367 U.S. 643; *Marcus* v. *Property Search Warrant*, 367 U.S. 717; *Stanford* v. *Texas*, 379 U.S. 476 and the cases therein cited simply do not fit an inspection for fire and explosion prevention. There are dangers to civil liberties involved in a "watered down" criteria as suggested by the dissent in *Frank* v. *Maryland*, 359 U.S. 360 at 383.

V. The Only Individual Rights Involved In The Fire Inspection Of A Warehouse Are Property Rights Which Will Be Protected, Not Jeopardized, By The Inspection.

The instant case involves the inspection of a commercial warehouse, not a dwelling house or home or other structure or inclosure intimately used by the individual. The Fourth Amendment is intended to protect the rights of persons, it is not a blanket prohibition against an agent of a public authority entering into any structure. The chances of the political rights or the privacy of a citizen being invaded by the fire hazard inspection of a warehouse are nil. Warehouses are not used by the individual in the intimate sense that his home, office, garage or automobile are. Rather, warehouses are for the purpose of protecting innate physical objects. There is no contention,

nor even a suggestion that entry to the warehouse was denied in the instant case to protect the "person, house, papers and effects."

These rights of possession are the only individual rights involved in this case. Are those rights jeopardized by the inspections contemplated by 8.01.050? Not to the smallest degree. Fire inspectors aren't thieves. In fact, these possessory rights are enhanced by the protection afforded by a fire inspection. Warehouse fires and explosions could destroy untold lives and amounts of property, and the inspection by fire prevention experts materially reduces that risk.

VI. Where All Available Information Conclusively Demonstrates That Fire Inspections Materially Reduce Fire Loss, Appellant, Who Has Made No Showing That He Or Others Intimately Connected With His Warehouse Have Liberties Which Will Be Jeopardized By A Fire Inspection, Has A Responsibility As A Property Owner To Cooperate With The Inspectors.

Actual experience in Seattle shows conclusively that an effective fire safety inspection program materially reduces the number of incidents of fire and explosions and the seriousness thereof when a fire or explosion does occur, thereby resulting in a lesser loss of life and property. The inspecting firemen are also afforded the opportunity of educating building owners or occupants on the advantage of fire prevention programs and themselves on how to get persons out of or themselves into specific buildings in case of a fire. In case of a fire, the life of Appellant or Appellant's employees may depend upon such knowledge.

The upholding of Appellant's claim means the complete nullification of Seattle's fire prevention program as to Appellant's warehouse. Under the stipulated facts no Fourth Amendment warrant can issue. Thus no inspection can be made.

This means that Appellant's warehouse could secretly contain the "dangerous" and "hazardous" "conditions or materials" specified in Section 8.01.060 of the Ordinance and nothing can be done to protect Appellant's employees, firemen, neighbors and the public. Appellant can store secretly, in his warehouse, with complete immunity, "dangerous or unlawful amounts of combustible or explosive or otherwise hazardous materials", and despite its duty to protect property and the health, safety and welfare of all persons within its corporate limits, the City of Seattle is powerless to do anything to eliminate these dangers.

Appellant under his claimed constitutional right can secretly violate this Ordinance's provisions (§ 8.01.060, subsections 2 through 5) in his warehouse by maintaining:

> "2. Hazardous conditions arising from defective or improperly installed equipment for handling or using combustible or explosive or otherwise hazardous materials;
>
> "3. Dangerous accumulations of rubbish, waste paper, boxes, shavings or other highly flammable materials;
>
> "4. Accumulations of dust or waste material in air conditioning or ventilating systems or of grease in kitchen or other exhaust ducts;
>
> "5. Obstructions to or on fire escapes, stairs, passageways, doors or windows, liable to interfere with the operations of the Fire Department or egress of occupants in case of fire."

Appellant can secretly violate subsection 6 which provides for inspection and correction of:

> "6. Any building or other structure which, for want of repairs, lack of sufficient fire escapes or other exit facilities, automatic or other fire alarm apparatus

> or fire extinguishing equipment, or by reason of age or dilapidated condition, or from any other cause, creates a hazardous condition."

Surely, Appellant is not entitled to the convenience of a city location for his warehouse without the assumption of his share of the burdens which arise from that warehouse location. Appellant could build himself a warehouse in the middle of 1,000 rural acres and thereby create no danger to anyone by complete privacy. But the overwhelming experience proves the contrary when he locates his warehouse in a city where the dangers found by the Seattle City Council exist.

Appellant should be required to assume the responsibilities which accompany the privileges of private property in an urban community. Elementary to those responsibilities is the duty not to endanger or harm neighbors or neighboring properties. Appellant is totally ill equipped to carry out an effective program of fire prevention. He must, therefore, as a matter of individual responsibility, do everything in his power to cooperate with the municipal agents who are appointed to protect his and other's property from fire.

VII. Application Of The Fourth Amendment In The Instant Case Would Weaken The Protection Afforded By That Amendment By Giving Rise To A Weakened And Sophistic Definition Of Probable Cause.

The Bill of Rights is and must be, if it is to endure, a nontechnical document which can be read and understood by a citizen of ordinary intelligence. Mr. Justice Goldberg stated in *United States* v. *Ventresca*, 380 U.S. 102, 108, that "the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract". A

substantial weakening of the Amendment will take place if its purview is extended to areas where no citizen's liberties are involved, and the granting of a warrant becomes a mere routine.

Examination should be made into what facts will be placed before a magistrate for him to use in determining if there is probable cause to believe fire hazards are present. In the vast number of cases, the fire inspector will be able to make no showing except that the building has not been inspected for a certain length of time, and that experience, perhaps statistics, show that normal deterioration alone over this period gives rise in many instances to hazardous conditions. Upon consideration of the practical fact that no individual rights are threatened by the proposed inspection, the magistrate might well issue the warrant. Yet, this showing hardly amounts to probable cause as that requirement is understood in cases involving wilful crimes. See generally *United States* v. *Ventresca*, 380 U.S. 102; *Jones* v. *United States*, 362 U.S. 257. The wilful acts of an individual carried out in the preparation or consummation of a crime often leave a trail of discernible facts which provide the filament for the affidavits upon which the magistrate determines whether to issue a warrant. The gradual deterioriation of innate materials in a structure, or the unknown accumulation of debris within the confines of a locked warehouse provide none of these indicia of guilt.

Application of the Fourth Amendment to the present situation will have one of two unhappy results. Either fire inspections of a routine and periodic nature will cease to be carried out, or else a new standard of probable cause, a sophistic standard unconnected with the age old rights the Fourth Amendment was designed to protect, will evolve.

There is undoubtedly a tendency at the present to underestimate dangers from such elemental sources as fire largely

because society's preventative measures have been so successful. However, the danger of fire in many of our blighted cities, some predominantly built of frame and other non-fire proof materials, is not to be overlooked. Where no individual rights are involved it would be ludicrous to endanger life, limb and property with an overzealous interpretation of a simple and practical injunction.

VIII. The Seattle Fire Code Is Preventative And Corrective, Not Criminal In Nature, And It Does Not Conflict With The Fourth Amendment Either As It Is Written Or As It Is Carried Out.

There is no argument but that fire prevention is an essential governmental function under the city's police powers. It is conceded by all members of this Court participating in *District of Columbia* v. *Little,* 339 U.S. 1, *Frank* v. *Maryland,* 359 U.S. 360, and *Eaton* v. *Price,* 364 U.S. 263, that inspections to implement health codes are an appropriate method of assuring uniform compliance and such compliance is essential for the protection of the public health and safety. The same conclusion is applicable to a fire and explosion hazard ordinance.

Under Section 8.01.050 of Ordinance 80101, the Fire Chief has the duty of inspecting "all buildings and premises" except the interior of dwellings; the purpose of the inspection is for "ascertaining and causing to be corrected any condition liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards". In essence, fire safety inspections under the Ordinance are educational in nature conducted to acquaint owners and occupants of non-dwelling buildings for the purpose of eliminating, or reducing such hazards to a minimum in order to protect life and property.

The Ordinance does not authorize the Fire Chief to force

entry into a building or seize or inspect the private papers of the occupant or search for or seize evidence of crime. The Ordinance does not authorize inspections at unreasonable hours or by unreasonable means or with unreasonable frequency, even though the hours of inspection may vary with the use and the frequency with the hazard. Nor does the Ordinance authorize inspections of Appellant's place of habitation, or authorize unannounced intrusions. Arrest, forcible entry, rummaging of drawers, search of private papers and effects such as are found in a search for criminal evidence is not authorized in this exercise of the police power of the City to protect the public safety and welfare. As emphasized by the Washington Supreme Court the "inspection in the present case was only for discovering of fire hazards." R. 27. In the 590,576 routine fire inspections of commercial and industrial properties made in Seattle under the Ordinance between 1954 and 1962, 148,821 notices of violations were issued. See Appendix A.

A clear distinction exists between this type of inspection and a search for criminal evidence. The validity of this distinction is apparent when consideration is made of the consequence of the inspection. No criminal penalty is placed on the individual upon discovery of a hazardous condition. It is only upon failure to comply with the lawful remedial order of the Fire Chief issued pursuant to the Ordinance that upon conviction a person becomes punishable by a fine not to exceed ninety days, or by both such fine and imprisonment (R. 11).

To the extent that the Seattle Fire Code provides for a penalty for failure to comply with a lawful order of the Fire Chief to eliminate dangerous or hazardous conditions it is similar to the ordinance upheld by this Court in *Frank* v. *Maryland*, 359 U.S. 360.

Fire inspections, as a practical matter, have as their subject, material which, in most instances, is totally irrelevant to a criminal investigation. The purpose of the investigation is dominate in the mind of the fireman. Material which would have significance to a police officer making a cursory inspection, would have no significance to a fire inspector except in so far as it constituted a fire hazard.

Use of knowledge gained through abuse of the fire inspection process would be prohibited by the courts. *Mapp* v. *Ohio*, 367 U.S. 643, 655.

IX. The Principle Involved In Frank v. Maryland Should Not Be Overruled In This Case

While this case is distinguishable due to the commercial warehouse involved, it is submitted that the principle of law announced in *Frank* v. *Maryland*, 359 U.S. 360, and affirmed in *Eaton* v. *Price*, 364 U.S. 263 should not be overruled. Faulting the majority's statement on history of the Fourth Amendment as incomplete because it emphasizes "criminal prosecutions and forfeitures", seems erroneous, as the very next sentence of the Opinion states that the "application of the Fourth Amendment" is "not restricted within these historic bounds" 359 U.S. at 365, 366. The Dissenting Opinion's reference to possible weakening of the requirements of probable cause in issuing warrants for health and fire inspections (359 U.S. at 383) does not reveal any substantial reason against the actual decision in *Frank*. The decision is sound in principle. It has now been tested in practice for approximately seven years. During this period municipalities have pursued, and in many cases intensified, their planned safety inspection programs. The absence of planned or regular routine inspections is referred to some seven times in Mr. Justice Brennan's opinion

in *Eaton*, 364 U.S. at 268, 272. Two conclusions are clear: First, public opinion continues to sanction and in the great majority of instances has welcomed such efforts; and Second, the abuses and forms of subterfuge feared by many have failed to materialize. Nor did they exist prior to *Frank* and *Eaton*.

During this period from 1959 to 1967 five state courts have passed upon the validity of municipalities requiring inspection of buildings for health, safety and fire prevention purposes. *DePass* v. *City of Spartanburg*, 107 S.E. 2d 350 (S.C. 1959); *St. Louis* v. *Evans*, 337 S.W. 2d 948 (Mo. 1960); *Commonwealth* v. *Hadley*, 1359 Mass. Adv. Sheets 1966; *Camara* v. *Municipal Court*, 237 Adv. Cal. App. 136, 46 Cal. Reptr. 585 (1965); and the instant case, *See* v. *City of Seattle*. Each of the state courts reviewed the questions presented by Appellant here and each upheld the municipalities power and duty to inspect. Thus aside from *District of Columbia* v. *Little*, 178 F. 2d 13 (D.C.Cir. 1949), affirmed on other grounds 339 U.S. 1, in which a dwelling, not a warehouse, was involved, more than 100 years of city inspections for health and safety purposes have found no appellate court upholding Appellant's contentions. This national record in itself indicates that inspectors have not abused inspections for safety and explosion purposes.

Recent pronouncements in other First or Fourth Amendment or Due Process cases do not require that the Rule of the *Frank* case be overruled. *Mapp* v. *Ohio*, 367 U.S. 643; *Marcus* v. *Property Search Warrant*, 367 U.S. 717; and *Stanford* v. *Texas*, 379 U.S. 476 are classic examples for applicability of the Fourth Amendment and so obviously distinguishable on their facts as not to require consideration here despite Appellant's reliance upon them in urging the overruling of *Frank* or *Eaton*.

Conclusion

For the reasons set forth herein it is submitted that the Judgment in this case should be affirmed.

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APPENDIX A

Per Capita Fire Loss

From Annual Reports of Seattle Fire Department for Years Indicated
[These reports are printed public records of the City of Seattle]

Year	Seattle Loss	National Loss
1954	$1.86	$5.42
1955	1.34	5.45
1956	2.19	5.60
1957	1.24	5.96
1958	4.32	6.07
1959	1.03	6.12
1960	.83	6.14
1961	1.93	6.72
1962	2.26	7.09
1963	3.40	7.36
1964	3.13	7.07
1965	4.12	7.07
Totals:	$27.65	$76.07

Routine Fire Inspections

Year	Inspections Commercial & Industrial	Notices
1954	41,604	24,312
1955	41,498	23,290
1956	31,821	25,305
1957	21,961	19,402
1958	41,057	10,052
1959	71,626	11,031
1960	87,098	12,923
1961	121,940*	9,541
1962	131,971*	12,965
1963	88,297	N/A**
1964	63,516	N/A
1965	85,220	N/A

* Includes night inspections of high life hazard occupancies (hotels, hospitals, nursing homes, etc.) and reinspections.

** Not Available because new Fire Chief did not compile and publish in the Annual Reports for these years.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 92

ROLAND CAMARA, *Appellant,*

v.

MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, *Appellee.*

No. 180

NORMAN E. SEE, *Appellant,*

v.

CITY OF SEATTLE, *Appellee.*

APPEALS FROM THE DISTRICT COURT OF APPEALS OF THE STATE OF CALIFORNIA, AND THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF AMICI CURIAE OF THE MEMBER MUNICIPALITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS.

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Interest of Amici Curiae

The National Institute of Municipal Law Officers (NIMLO) is an organization composed of more than thirteen hundred municipalities located in each of the fifty

states, the District of Columbia and Puerto Rico. Each member city acts through its chief legal officer, known variously as City Attorney, City Solicitor, Corporation Counsel, Director of Law, etc.

This brief is filed pursuant to rule 42(4) of this Court. The members of NIMLO are political subdivisions of states, and this brief is sponsored by their authorized law officers.

The issue presented in these cases is of vital interest not only to the Cities of Seattle and San Francisco but to all municipalities which seek to prevent health and fire hazards and exercise other necessary police power functions under ordinances providing for reasonable inspections of commercial buildings and private houses. The issue is also of vital interest to the millions of inhabitants of those municipalities whose life and health and property are protected by such inspections.

The members of NIMLO were represented by brief amici curiae and also in oral argument in the first case presenting to this Court the issue of the constitutionality of municipal housing inspection, *District of Columbia* v. *Little*, 339 U.S. 1 (constitutional issue not decided). They were also represented by brief amici curiae in *Frank* v. *Maryland*, 359 U.S. 360 and *Ohio ex rel Eaton* v. *Price*, 364 U.S. 263. It is because of the collective experience of the NIMLO municipalities with the necessity for reasonable inspection ordinances, and their awareness of the danger which is posed to the health, safety, and general welfare of their respective communities by these attempts to eliminate those ordinances, that this brief amici curiae is filed.

Summary of Argument

The rights guaranteed by the Constitution are not absolute. In the case of the right to privacy under the fourth amendment, only *unreasonable* searches are prohibited.

The same limitation, though not in specific terms, applies to the right to privacy under the fourteenth amendment. Whether a search is or is not unreasonable depends upon a balancing of all interests for and against allowing the search. In this case, the interest of all the people in guarding the public health and safety outweighs the interest of the individual householder in being free from the slight inconvenience caused by reasonable municipal inspection of commercial buildings and dwellings. Commercial building and housing inspections are not unreasonable searches (or seizures) within the meaning of the Fourth or Fourteenth Amendments.

ARGUMENT

I. Constitutional Prohibitions Apply Only to Searches Determined To Be "Unreasonable" After Consideration of All Interests and Facts.

The civil liberties guaranteed by the Constitution are not absolute. They are subject to reasonable limitations in the exercise of the police power of the state. *American Communications Ass'n.* v. *Douds,* 339 U.S. 382, 398-99. This Court has said:

> "We have never held that such freedoms are absolute. The reason is plain. As Mr. Chief Justice Hughes put it, 'Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excess of unrestrained abuses.' " Id. at 399.

Moreover, the guarantee of individual privacy by the Fourth Amendment is by its language specifically qualified. It is not an absolute prohibition of all searches of commercial buildings and houses. It prohibits only those which are "*unreasonable* searches." (Emphasis added.)

The same limitation must be read into the due process of law clause of the Fourteenth Amendment. The determination of whether inspection of commercial buildings under the San Francisco and Seattle ordinances is an *unreasonable* search within the meaning of the Constitution will depend upon a balancing of interests between the right of an individual to privacy in his own home or commercial building and the duty of a municipality to guard the health and welfare of all its people through the exercise of its police power. It is to this balancing of interests that the Amici Curiae wish to direct their argument. Because of the collective experience of more than thirteen hundred NIMLO member cities all over the nation in fire prevention and sanitation, the Amici Curiae feel particularly qualified to bring to the attention of this Court the gravity and importance of the public interest in the preservation of reasonable inspection ordinances.

II. The Public Interest Requires Commercial and Housing Inspections

Commercial building and dwelling inspections cannot be made from a courthouse. It is not a question primarily of the inconvenience involved in procuring a warrant every time there is a complaint as to unsanitary or unsafe conditions. The fact is that the public cannot be protected merely by following up warrantable complaints. The major public health and safety programs in this country are grounded on the concept that it is through prevention of conditions which result in health and safety hazards, and not in the punishment of violators, that the public welfare is best protected.

A reversal of the decisions of the state courts in these cases would destroy the systems of preventive inspections now set up all over this country, and would make fire and

safety inspectors mere process servers for the purpose of abating conditions which have already grown to the stature of public menace. Effective health, fire and safety administration is not based upon complaints, but is the result of periodic scientific checks by trained inspectors to determine health, fire and safety conditions and recommend such corrective action as is needed to prevent or eliminate hazards and dangers. This fact is amply illustrated by the results of a test survey conducted by a grand jury in New York City convened to investigate hazardous and unsanitary conditions in housing. Surveyed by an inspection team were fifteen square blocks of housing in three respective areas of Brooklyn, in which 567 housing division violations had been previously reported on complaint. The inspection survey revealed an actual total of 12,445 violations in the test area, many of them classed as "hazardous." Moreover, other New York City inspections indicated that this ratio was not out of line. Grand Jury Presentment, "In the Matter of the Investigation of the Enforcement of Any and All Laws Concerning Hazardous and Unsanitary Conditions in Dwellings, etc.," Kings County Ct., N.Y., pt. 1, pp. 6-8 (January 28, 1953).

Only 567 violations on file prior to the test inspection as against 12,445 violations after the test! Can there be any doubt of the need for regular preventive inspections?

III. Illustrative City Experience Underscores the Health and Safety Needs Which Can Only Be Met by Routine Periodic Inspections.

Programs of preventive inspection similar to that conducted by San Francisco and Seattle have drastically reduced fire hazards in countless other cities in this country. These inspections have been part of a scientific plan to educate the householder into avoiding catastrophe rather than

confining municipal efforts to extinguishing fires after they have occurred.

History is replete with city-wide fires: London in 1666, New York City in 1835, Boston in 1872, Chicago in 1871, and Baltimore in 1904, and Seattle in 1889.

Destructive fires took a toll of 12,000 lives and nearly $1.75 billion in property in 1965 in the United States according to a report by the National Fire Protection Association, "Fires and Fire Losses Classified—1965," Fire Journal, Vol. 60, No. 5, September 1966. The fire fatality total showed an increase of 100 over the previous year, and brought the figure close to the record mark of 12,100 fire deaths reported in 1954. One small note of encouragement in the report was a slight decline in fire deaths in homes. In 1965 approximately 6,500 persons were killed in home fires, compared with 6,550 in 1964. Almost one-third of all fire victims in the home—about 2,100—were children. The 1965 property loss total was $1,741,300,000, a 5.4 per cent increase from the previous year, when fire cost $1,652,700,000. 1965 was the sixth successive year in which the loss total has exceeded the $1.5 billion mark. Among the principal factors in the increase in property losses was a sharp rise in the cost of fires in industrial plants, private dwellings, stores, hotels and churches. *Ibid.*

There is a great need for inspection in connection with garbage and rodent nests, two of the greatest sources of the spread of disease in this country. If the health officers of all the cities of the country are to wait for the complaints of neighbors and then issue warrants predicated upon the information received, the effective work that is being done in preventing epidemics in this country will henceforth be curbed. For every neighbor who complains, there are hundreds who are unwilling to become involved in a backyard fight to preserve the health of the community, others who

are phlegmatic to the danger, and still others who are joint offenders.

The Chicago Board of Health, from November, 1965 to December, 1966, conducted a massive program to eliminate rodent infestation in the city on a door to door, block by block basis, inspected 46,007 buildings of which 18,654 were found to be rodent infested. In addition to being rodent infested, 80% of the buildings inspected were found to be insect infested. The Chicago Fire Prevention Bureau, from January 1 to December 1, 1966, conducted scheduled or systematic inspections of 67,155 residential, 14,014 hotels, 51,360 industrial, 37,458 commercial, 12,548 schools, 2,843 hospitals and 6,623 day nurseries. And during the same period of time the Chicago Building Department made 47,461 inspections pursuant to complaints received, 37,168 inspections in conservation areas, and 22,713 buildings as prescribed by the City Code.

For the year 1965, the City of Cleveland Division of Housing effected 50,254 inspections and found 42,622 violations. The Cleveland Health Department made 55,913 inspections of commercial establishments and found 33,809 violations, and inspected 38,312 dwellings and found 27,553 violations. In addition the Cleveland Fire Prevention Bureau made 17,080 inspections and 7,422 reinspections, and found 14,892 violations.

The City of Boston Housing Inspection Department, during the period May, 1965 through September, 1966, inspected 48,806 dwellings, 20,056 buildings, found 56,338 violations, and made 44,484 reinspections. The Boston Redevelopment Agency also conducted 6,220 inspections during that period.

The Baltimore Bureau of Building Inspection made 13,408 inspections in 1965. As was shown in *Frank* v. *Maryland*, 359 U.S. 360, 372, fn.16, the Baltimore Health Department

had made 36,119 housing sanitation inspections in the year 1958.

The City of Los Angeles Conservation Bureau made a total of 129,574 inspections in 1965-66. And during that same period the Los Angeles Bureau of Fire Suppression inspected 76,527 dwellings, made an additional 183,596 general inspections, 7,962 vacant lot inspections and 5,333 unclassified inspections, during the course of which they found a total of 28,569 hazardous violations.

The City of Portland, Oregon conducted home surveys of 27,374 dwellings in 1966, and found a total of 4,514 violations of health and safety regulations. During 1965 the Portland Fire Marshall conducted 15,851 routine fire inspections, and 8,827 special inspections on complaints, and noted a total of 17,209 violations.

The City of Jacksonville, Florida, conducted 21,111 fire prevention inspections and reinspections of apartment buildings, business and industrial establishments in 1965, and during the same period the Jacksonville Health Department conducted a total of 135,330 inspections.

The City and County of San Francisco, whose ordinance is involved in the instant case, through its Health Department made inspections in 1965-66 as follows: Apartments 46,626, Hotels 8,105, Dwellings 8,251, for a total of 62,982. The San Francisco Public Works Department for the same period conducted 13,337 building permits inspections, 52,-137 building inspections, 43,478 electrical inspections and 33,073 plumbing inspections. The San Francisco report advised that their inspectors have been refused entry to premises on less than ten occasions during the fiscal year 1965-66.

The City of Seattle conducted the following routine fire inspections of commercial and industrial buildings: 131,971 in 1962; 88,297 in 1963; 63,516 in 1964 and 85,220 in 1965.

These statistics bear out the fact that hundreds of thousands of inspections are made by cities each year without a warrant and are sanctioned by the overwhelming majority of the people.

Cities maintain these costly inspection programs because their people feel they are necessary for the protection of the general health, safety and welfare. The local governments of this nation spend billions of dollars each year on sanitation activities. It is not the zeal to render a public service that impels cities to maintain these costly sanitation programs. It is the recognition of the fact that the control of garbage is the primary step in the control of certain very serious diseases. For example, the danger of typhus, where the infection results from the bites of insects borne by rats, is tremendously increased where the garbage sanitation is not adequately controlled. The same danger exists where housing inspectors are not allowed to inspect dwellings or commercial buildings for rodent infestation and other health and safety hazards.

Possible health or safety hazards in Appellants' building are not Appellants' business alone. Fires ignited by safety hazards which might have been uncovered by municipal inspection spread to adjoining buildings and houses, and have been known to level entire city blocks. Rodents which breed in filth do not stay at home, nor do the disease germs which they spread. A man's home may be his castle, but that castle no longer sits on a hill surrounded by a moat. The modern "castle" is connected to a common water system, a common sewer system, a common garbage collection system, a common police, fire, health and welfare service, a common telephone service, a common gas line, a common electric line, common streets, alleys, sidewalks and drains, and are frequently connected by common walls to

the houses on either side. A man's home is his "castle," but cities through health and safety inspections are trying to keep it from becoming his "casket."

The case of the open garbage can may not be as intriguing to students of constitutional law as a case involving freedom of speech and assembly, but the assemblage of rodents and germs can have equally far reaching effect. A colony of rats is capable of increasing at the rate of six percent per day. One germ, after thirty divisions, becomes one billion germs—a formidable armed enemy. This is not fanciful, but realistic. To municipal officers, in constant touch with health and safety problems, it is impossible to shrug off the very real dangers that lurk in the everyday problems of sanitation. The practical administrative obstacles to operating inspection systems under laws which require warrants issued upon a showing of probable cause to suspect a violation of the building, housing, health or sanitary code before entering the house or building cannot be urged too strongly. It just cannot be reasonably done that way. Cause to suspect a violation would be present only in that portion of cases where complaints have been received or where a nuisance situation has reached the point where it can be seen or smelled from outside the building. Olfactory health control is no answer to the major health and safety problems of this country. The violations that smell represent too small a portion of the whole. By the time putrefaction sets in, very valuable time has been lost and an emergency phase has begun. The whole public health program is predicated upon the basic principle that improper practices must be corrected and abated *before* they reach the stage of glaring danger.

If building and housing inspection ordinances are invalidated, countless cases of defective building and household plumbing which inspections would discover will be

permitted to continue uncorrected. Defective plumbing may cause back siphonage of sewage and other household wastes into the public water supply. The amoebic dysentery epidemic in Chicago in 1933, resulting in 100 deaths in over 1,000 known cases, was caused by just such a situation. *Amoebic Dysentery in Chicago,* 24 Am. J. Pub. Health 756 (1934). Water is also a vehicle for the dreaded diseases of cholera and typhoid fever.

The invalidation of commercial building and housing inspection ordinances would prevent the effective checking of electrical work for fire hazards, or of hot air furnaces to determine whether proper combustion is achieved so as to prevent the escape of noxious gas. It is worth noting that about two years after the attempted inspection in *District of Columbia* v. *Little,* 339 U.S. 1, a fire gutted the home of the respondent and burned to death her two-year-old child. Washington Star, Aug. 6, 1949, p. A-20, col. 1; Aug. 7, 1949, p. A-7, col. 7. While the cause of the fire was reported as undetermined, the incident serves as a grim reminder of the kind of loss that can frequently be prevented by municipal inspection.

Field inspections also play a vital role in urban redevelopment and slum clearance. D. C. Department Licenses & Inspections Rep., "Housing Code Enforcement" (Dec. 24, 1958). Federal government statistics show that slums, which constitute only 20% of the total residential area of the average American city, produce 35% of all fires, 45% of major crimes, and 50% of disease. Id. at 23. In the important case of *Berman* v. *Parker,* 348 U.S. 26, 32, this Court recognized that:

> "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the

people who live there to the status of cattle. They may indeed make living an almost insufferable burden."

It is equally true and imperative that the Fourth Amendment should not be interpreted as constituting a bar which prevents the legislature from protecting the values pointed out so vividly in *Berman* at 348 U.S. 33 where this Court said:

> "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

To impede the routine, periodic, area-wide non-discriminatory "civil" inspection of buildings and dwellings to protect these concepts and values by the requirement of obtaining hundreds of thousands of warrants in a time and court consuming process can serve but one purpose, and that it to endanger the continued existence of our nations cities.

There is also grave doubt whether any of the present state constitutional and statutory provisions which authorize a court to issue warrants for specific kinds of searches and seizures, mostly in the criminal area, would permit the issuance of a warrant for health and safety inspections.

IV. The Need for Periodic Inspections Has Been Recognized Not Only by Cities But by the Congress in Its Efforts to Solve the "City Crisis".

The "city crisis" is largely encompassed within the slum areas of cities. Area-wide, planned inspections of buildings are a major part of the Federal-City Cooperative pro-

gram to deal with the elimination of substandard homes which are thus unfit for human habitation.

The Congress has adopted federal-aid programs and authorized grants and the expenditure of billions of dollars to cities to rehabilitate and improve the housing and living conditions in our cities. A total financial responsibility for more than $78 billion was involved in the programs of the Department of Housing and Urban Development as of September 30, 1966. In order for a city to obtain federal-aid for slum clearance, urban renewal, and low-rent public housing, it must comply with the "Local Responsibilities" as set out in Sec. 101(a)(c) of Title 1, Housing Act of 1949, as amended, as follows:

> ". . . That commencing three years after the date of enactment of the Housing Act of 1964,* no workable program shall be certified or re-certified unless (A) the locality has had in effect, for at least six months prior to such certification or re-certification, a minimum standards housing code, related but not limited to health, sanitation, and occupancy requirements, which is deemed adequate by the Administrator, and (B) the Administrator is satisfied that the locality is carrying out an effective program of enforcement to achieve compliance with such housing code. . . ."

Under authority of this Act, the Administrator published a "Workable Program for Community Improvement, Answers on Codes and Ordinances, Program Guide 1," which sets out the following specific requirements with which a city must comply in order to be eligible for federal-aid:

> ". . . a codes review committee or similar group to review codes and code enforcement technically and objectively.

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* September 2, 1964 (footnote added).

"... the adoption of modern building, plumbing, electrical, housing and fire prevention codes during the first year after initial certification.

"... effective enforcement of codes following adoption and planned systematic housing code compliance program to be started within one year after the adoption of the housing code.

"... accurate reporting on compliance activity and a showing that there is a reasonable use of appropriate local resources in terms of inspectors and funds needed to enforce compliance with the codes."

The importance of code enforcement is also shown by the fact that the Federal Government through the Department of Housing and Urban Development has a specific program of federal assistance to local government to stimulate such enforcement.

It is submitted that the added burden of obtaining a Fourth Amendment warrant for each inspection under the requirements of Federal Laws would greatly impede the programs which the Federal Government and cities have instituted to alleviate the persistence of wide-spread slums and blight which have resulted in a marked deterioration in the quality of the environment and the lives of large numbers of people throughout the nation.

V. Interest of Individual Commercial Property Owner and Householder in Absolute Privacy

The *reasonableness* of the search involved in these cases depends upon a balancing of interests. It has been shown that the interest of the people—acting through their agents, municipalities—in exercising police power through health and safety inspections is indeed great. What are the interests of the individual owner in maintaining an absolute

right of privacy in his commercial building or home against such inspections.

It should be noted initially that the overwhelming majority of building and home owners feel their interests lie in permitting such inspections, and welcome the periodic visits of municipal inspectors which they know can uncover hazards the correction of which may save their lives by stopping fire or disease. Yet what of owners who, like Appellants, feel differently? What are the dangers to such property owners if inspection is allowed?

Unlike the householders in all cases in this Court where searches have been declared unconstitutional, these appellants are subject to no criminal prosecution. The inspecting official is not looking for evidence of a crime. Under the Seattle and San Francisco ordinances, as under most inspection ordinances, if a health or safety hazard is found the owner is merely notified to correct it and a penalty attaches only if he fails to comply. The result of the inspection is not that a defendant is convicted of a crime because of discovered evidence, but that an unsafe condition in his building or home is corrected. This Court has correctly held that properly circumscribed inspections without warrant, as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law, are valid. *Frank* v. *Maryland*, 359 U.S. 360.

But what of the nuisance to the householder caused by inspections? There is no contention in the instant cases that the owners were harassed by repeated inspections, nor that the inspections in question were to be made at an inconvenient time of the day. Indeed, the San Francisco ordinance under attack requires that the inspection be made at a reasonable time, and the particular inspection involved was attempted to be made during a reasonable hour. No facts on the time of the attempted Seattle inspection are

given. There is no contention in the instant cases that the inspectors had any motive other than the discovery of a possible health, fire or safety hazard. This is not the case of the knock on the door in the middle of the night, or even of interference with the family dinner hour. The rule of reasonableness which has been developed in cases passing upon due process of law (and which is specifically incorporated in the language of the Fourth Amendment forbidding only *unreasonable* searches) is always a protection against the capricious action of government officials. It cannot be doubted that abuses of the health and safety inspection ordinances could be remedied if they should transpire.

VI. Balancing of the Interests of Public Need and Individual Privacy

When the interests are balanced, then, the scales are grossly uneven. In order to preseve the nebulous private right of the Appellants and a few others like them, this Court is asked to jeopardize the lives and health of millions of city residents the nation over. One death from fire or disease originating in a filth strewn cellar should be sufficient to tip the scales but in fact thousands of such deaths are a realistic possibility.

The fundamental purpose of the Fourth Amendment was certainly to secure privacy in the home, and the due process of law clause of the Fourteenth Amendment also protects the right of privacy. But it must be remembered that under the police power there is lawful interference in many instances with the liberty of individuals, their right to move around and their right to use their property. Individual freedom must yield in some cases to the enforcement of reasonable regulations for the public welfare. The individual's right of privacy in his home should not give him the

right to refuse entry for a reasonable fire or health inspection any more than the right of free speech gives the right falsely to shout "fire" in a theater, *Schenck* v. *United States*, 249 U.S. 47, 52, or the right of freedom of religion gives the right to offer human sacrifice, *Reynolds* v. *United States*, 98 U.S. 145, 166.

Where public health and safety is at stake, this Court has sanctioned, as against constitutional objection based on individual rights, the power of the government summarily to enter premises and seize and destroy putrid food, *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306, and the power to provide for compulsory vaccination, *Jacobson* v. *Massachusetts*, 197 U.S. 11. Indeed, it has already recognized what the Amici Curiae urge upon it now:

> "Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of safeguards necessary for a search of evidence of criminal acts." *Frank* v. *Maryland*, 359 U.S. 360, 372.

VII. One Rebel a Year

The dissent in *Frank* v. *Maryland*, 359 U.S. 360, 384, suggests that "Submission by the overwhelming majority of the populace indicates there is no peril to the health program." The Amici Curiae are unwilling to accept a theory which makes the preservation of public health and safety dependent upon consistent submission by citizens to an invasion of their constitutional rights. If we believed housing inspections to be unconstitutional, we would encourage citizens to resist!

It is true that most housing occupants now welcome the

periodic visits of municipal inspectors. But there are others who, while realizing the value of housing inspection, are more concerned at the moment the inspector knocks on their door with the immediate prospects of having to spend time and money to correct possible defects.

The experience of the City of Portland, Oregon, with a program of voluntary home inspection indicates what can happen where entry is by consent. The records of the city for the year 1966 show that out of 16,171 calls made where occupants were at home, entry was refused in 2,540 cases. In the inspections which were made, 4,514 hazardous conditions were noted and called to the attention of the occupants.

"One rebel a year," says the *Frank* dissent, is not too great a price to pay for the right of privacy. The Amici Curiae submit that the human suffering and loss of life from fire and disease which can result from the undetected code violation of even one rebel a year are too great a price to pay for the type of privacy which Appellants seek. That there may be a significant increase in the number of refusals of entry if this Court declares housing inspection of the kind here involved unconstitutional is a reasonable, and frightening, possibility.

Conclusion

It is worth noting that in over 150 years of city *in rem* inspections for health and safety purposes, only one appellate court has held that a Fourth Amendment warrant is required and it was affirmed on appeal to this Court for other reasons without reaching the constitutional issue. *District of Columbia* v. *Little*, 339 U.S. 1. It is also noteworthy that not one of the five highest state courts to pass on this question since this Court's landmark decision in *Frank* v. *Maryland*, 359 U.S. 360, have found fault with the rule that reasonable inspections are constitutionally imperative for the protection of the health safety and welfare of the millions of inhabitants of cities. *M. DePass* v. *City of Spartanburg*, 107 S.E. 2d 350 (S.C. 1959); *St. Louis* v. *Evans*, 337 S.W. 2d 948 (Mo. 1960); *Camara* v. *Municipal Court*, 237 Cal., App. 2d 128, 46 Cal. Reptr. 585 (1965); *Commonwealth* v. *Hadley*, 1359 Mass. Adv. Sheets 1966, decided by the highest court of Massachusetts on December 2, 1966; and *Seattle* v. *See*, 67 Wash. 2d 465, 408 P2d 262 (1966).

This brief is not submitted with a desire to weaken the individual rights guaranteed to all of us by the Constitution, but in an attempt to put those rights in a proper perspective. It is earnestly submitted that it was never the intended purpose of the Fourth and Fourteenth Amendments to prevent reasonable building and housing inspections to protect the public health and safety, and they should not be expanded to that point. It has been the vigilance of public health and safety inspectors and their well-integrated programs that have saved this country from some of the epidemics, scourges and conflagrations that would otherwise inevitably have occurred. To confine inspections to instances where there is reason to suspect a hazardous condition from outside the commercial building or house would

be to cause the preventive health and safety programs based upon periodic scientific checks to grind to a halt in cities throughout the nation. The decisions of the Courts below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 180

NORMAN SEE,

Appellant,

—against—

CITY OF SEATTLE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY BRIEF FOR APPELLANT

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY BRIEF FOR APPELLANT

This brief is submitted primarily to make clear, contrary to suggestions contained in Appellee's Brief, that Appellant's constitutional right of privacy can be protected without unduly restricting the administrative power of inspection or impeding an effective system of fire prevention.

Appellee's argument is flawed in two major respects. In the first place, it virtually ignores the values embodied in the right of privacy. Secondly, in part because of a misconception of Appellant's argument, it raises a false spectre of conflagration if Appellant's constitutional rights are protected.

1. If this Court accepts Appellee's insistence that private property must be subject to inspection on the mere say-so of an official, an important facet of the right to privacy will be abrogated just at a time when the important personal and social values it protects have been subject to redefinition and expansion by this Court. See the cases discussed in Appellant's Brief, pp. 19-20. This is not to deny the obvious need for administrative power of inspection and enforcement in an increasingly urbanized society. Rather it is to assert that this power of inspection is not an absolute, but that it is qualified by individual rights protected by the Constitution, and that it cannot be permitted to vitiate the individual's interest in the sanctity of his private premises. In short, if an inspector —or a person claiming to be an inspector—automatically can gain entry to private property over the objection of the owner, privacy is reduced to the vanishing point and the right to be free from "unreasonable searches" is read out of the Fourth Amendment.

Consider this very case. There is nothing to show that the inspection was for the purpose of fire prevention, that it was part of a spot check or an area search of general applicability, and certainly nothing to show that Appellant's property posed a fire risk. Indeed, there may have been no valid motive whatever for the inspection. Appellee made no effort to demonstrate the reasonableness of the search conducted in this case. In fact, it concedes that "[n]o facts are in the record before this Court to indicate whether the public officials were reasonable in their approach. . . ." (Br. p. 14.) In effect, appellee asserts an absolute right to search appellant's premises at any time, "as often as may be necessary" in the judgment of the

searching officials. In other words, "[the inspectors] action could have been based on caprice or on personal or political spite. It hardly contradicts experience to suggest that the practical administration of local government in this country can be infected with such motives." *Eaton* v. *Price*, 364 U. S. 263, 271 (1960) (dissenting opinion).

The ordinance from which Appellee derives its claim of right to search contains no limitations on the time or frequency of searches, and it specifically authorizes a search for the purpose, *inter alia*, of uncovering evidence of violation of the ordinances of the city. The prevention of general exploratory searches for evidence of crimes is of course the central purpose of the Fourth Amendment. See, e.g., *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344 (1931).

The essence of Appellant's claim is that there must be *some* recognition of Fourth Amendment limitations and the right of privacy in the administration of fire prevention programs. There must be *some* judicial barrier to the exercise of unchecked discretion by administrative officials seeking to gain admission to private premises. There must be *some* rational means of assuring the private citizen that his property is being opened as part of a rational inquiry of authorized representatives of local government and not for frivolous or even venal motives of inspectors or impostors. And as pointed out in the opinion of Mr. Justice Brennan in *Eaton* v. *Price*, *supra* at 272, the time for an official seeking entry to make an independent justification is not in a criminal proceeding—by which time the individual has acted at his peril—but in advance of prosecution before a magistrate empowered to issue warrants. This is the practice in England, see *Eaton* v. *Price*,

supra at 272, and it reflects an approach that will protect the right of privacy without stultifying regulation of the public health and safety.

2. Appellee's Brief contains numerous references to the supposed dire consequences that will follow reversal of the decision below. For example, at pages 17-18, Appellee states:

> The upholding of Appellant's claim means the complete nullification of Seattle's fire prevention program as to Appellant's warehouse. Under the stipulated facts no Fourth Amendment warrant can issue. Thus no inspection can be made.
>
> This means that Appellant's warehouse could secretly contain the 'dangerous' and 'hazardous' 'conditions or materials' specified in Section 8.01.060 of the Ordinance and nothing can be done to protect Appellant's employees, firemen, neighbors and the public.

This incendiary claim is without substance. In the first place, available empirical data reveals that very few persons object to official searches. See *Frank* v. *Maryland*, *supra* at 372, 383-384. Thus the requirement of a warrant in a rare instance can hardly be said to be disruptive of the administrative program. The enforcement of health and safety codes will not be frustrated. Where considerations of health and safety are involved, there will surely be a different standard of "probable cause" than in the case of criminal investigations. The two situations are simply not comparable, and should be distinguished for constitutional purposes, particularly in view of the fact that the Constitution, by prohibiting "*unreasonable* searches

and seizures" (emphasis added), rejects a mechanical approach indiscriminately applying the concept of probable cause.

Accordingly, a program of area-by-area searches, spot checks, or periodic inspections can be justified without requiring proof of the probable existence of illegal or dangerous conditions. Compare *Frank* v. *Maryland, supra* at 383 (dissenting opinion). Certainly, if there is such proof, or especially an emergency warranting immediate action, a search can properly be made. "The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought." *Ibid.* The critical constitutional requirement is that an unwilling door should not be opened without a showing of some valid administrative need and some regulation of the time and manner of the search. This is a far cry from justifying the conclusion, which permeates Appellee's Brief, that probable cause will be inflexibly adopted from the different setting of the criminal law.

A sensible application of the Fourth Amendment along the lines suggested above should dispose of any fears that tragedy will inevitably follow if this Court provides some procedural protection for the individual right to privacy. Considerations of administrative convenience have never proved the definitive test of a reasonable search under the Fourth Amendment. It is always more convenient for administrative officials to proceed ex parte, without having to justify their actions before a neutral and detached official. Frequently, there have been attempts to limit constitutional rights on these grounds, and just as frequently these have been rejected. See, e.g., *Weeks* v. *United States,* 232 U. S. 384 (1914); *Mapp* v. *Ohio,* 367 U. S. 643 (1961).

Similarly, it is surely off the mark to claim, as does the Appellee here, that an administrative search is "aimed at the saving of life and property" (Br. p. 10) and that the criteria for determining the propriety of such searches "are matters for administrative judgment and such inquiries are not peculiarly judicial in nature" (Br. p. 16). These contentions have forcibly been rejected, again and again, with respect to the criminal law. And certainly it is indefensible to suggest that somehow the Constitution is less solicitous of privacy when the purpose of the search is "administrative." The terse language of Chief Judge Prettyman in *District of Columbia* v. *Little*, 178 F. 2d 13, 17 (1949), aff'd on other grounds, 339 U. S. 1 (1950), puts the matter in proper perspective:

> To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity.*

3. Appellee seeks to support the constitutionality of the Seattle ordinance (Sec. 8.01.050) and the validity of the search conducted pursuant thereto by relying upon a purported constitutional distinction between searches of residences and searches of *private* commercial premises. Appellee's Brief at 11-16. This reading of the Fourth Amendment is in error. Appellee cites no authority for the proposition asserted, and the plain fact is that the Court has specifically refuted this argument. It has recognized that these premises are within the purview of Fourth Amend-

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* See Appellant's Brief at 16-19 for further discussion of this point.

ment protections. In *Lanza* v. *New York*, 370 U. S. 139, 143 (1962), it was stated that a "business office is a protected area [Silverthorne Lumber Co. v. United States, 251 U. S. 385 (1920)], and so may be a store [Amos v. United States, 255 U. S. 313 (1921)]." See also cases cited in Brief for Appellant at 11-13.*

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* Several lower courts have similarly held that the constitutional protection against unreasonable searches extends to business premises as well as dwelling houses. See, e.g., *Janney* v. *United States*, 206 F. 2d 601, 603 (4th Cir. 1953); *Martin* v. *United States*, 183 F. 2d 436, 439 (4th Cir.), cert. denied, 340 U. S. 904 (1950); *In re Phoenix Cereal Beverage Co.*, 58 F. 2d 953, 956 (2d Cir. 1932); *United States* v. *Di Corvo*, 37 F. 2d 124, 132-33 (D. Conn. 1927); *State* v. *Cardinale*, 73 N. J. Super. 168, 171, 179 A. 2d 188, 189 (1962).

CONCLUSION

The judgment of the Supreme Court of Washington should be reversed and Appellant's conviction vacated.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 180.—October Term, 1966.

Norman See, Appellant, v. City of Seattle.	On Appeal From the Supreme Court of Washington.

[June 5, 1967.]

Mr. Justice White delivered the opinion of the Court.

Apellant seeks reversal of his conviction for refusing to permit a representative of the City of Seattle Fire Department to enter and inspect appellant's locked commercial warehouse without a warrant and without probable cause to believe that a violation of any municipal ordinance existed therein. The inspection was conducted as part of a routine, periodic city-wide canvass to obtain compliance with Seattle's Fire Code. City of Seattle Ordinance No. 87870, c. 8.01. After he refused the inspector access, appellant was arrested and charged with violating § 8.01.050 of the Code:

> "Inspection of building and premises. It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards."

Appellant was convicted and given a suspended fine of $100 [1] despite his claim that § 8.01.050, if interpreted to

[1] Conviction and sentence were pursuant to § 8.01.140 of the Fire Code:

"Penalty. Anyone violating or failing to comply with any provision of this Title or lawful order of the Fire Chief pursuant hereto shall upon conviction thereof be punishable by a fine not to exceed

authorize this warrantless inspection of his warehouse, would violate his rights under the Fourth and Fourteenth Amendments. We noted probable jurisdiction and set this case for argument with *Camara* v. *Municipal Court, ante.* 385 U. S. 808. We find the principles enunciated in the *Camara* opinion applicable here and therefore we reverse.

In *Camara,* we held that the Fourth Amendment bars prosecution of a person who has refused to permit a warrantless code enforcement inspection of his personal residence. The only question which this case presents is whether *Camara* applies to similar inspections of commercial structures which are not used as private residences. The Supreme Court of Washington, in affirming appellant's conviction, suggested that this Court "has applied different standards of reasonableness to searches of dwellings than to places of business," citing *Davis* v. *United States,* 328 U. S. 582. The Washington court held, and appellee here argues, that § 8.01.050, which excludes "the interior of dwellings,"[2] establishes a reasonable scheme for the warrantless inspection of commercial premises pursuant to the Seattle Fire Code.

In *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344; *Amos* v. *United States,* 255 U. S. 313; and *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, this Court refused to uphold otherwise unreasonable criminal

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Three Hundred Dollars ($300.00), or imprisonment in the City Jail for a period not to exceed ninety (90) days, or by both such fine and imprisonment, and each day of violation shall constitute a separate offense."

[2] "Dwelling" is defined in the Code as "a building occupied exclusively for residential purposes and having not more than two (2) dwelling units." Such dwellings are subject to the substantive provisions of the Code, but the Fire Chief's right to enter such premises is limited to times "when he has reasonable cause to believe a violation of the provisions of this Title exists therein." § 8.01.040. This provision also lacks a warrant procedure.

investigative searches merely because commercial rather than residential premises were the object of the police intrusions. Likewise, we see no justification for so relaxing Fourth Amendment safeguards where the official inspection is intended to aid enforcement of laws prescribing minimum physical standards for commercial premises. As we explained in *Camara*, a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

As governmental regulation of business enterprise has mushroomed in recent years, the need for effective investigative techniques to achieve the aims of such regulation has been the subject of substantial comment and legislation.[3] Official entry upon commercial property is a technique commonly adopted by administrative agencies at all levels of government to enforce a variety of regulatory laws; thus, entry may permit inspection of the structure in which a business is housed, as in this case, or inspection of business products, or a perusal of financial books and records. This Court has not had

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[3] See Antitrust Civil Process Act of 1962, 76 Stat. 548, 15 U. S. C. §§ 1311–1314; H. R. Rep. No. 708, 83d Cong., 1st Sess. (1953) (reporting the "factory inspection" amendments to the Federal Food, Drug, and Cosmetic Act, 67 Stat. 476, 21 U. S. C. § 374); Davis, the Administrative Powers of Investigation, 56 Yale L. J. 1111; Handler, The Constitutionality of Investigations by the Federal Trade Commission, I & II, 28 Col. L. Rev. 708, 905; Schwartz, Crucial Areas in Administrative Law, 34 Geo. Wash. L. Rev. 401, 425–430; Note, Constitutional Aspects of Federal Tax Investigations, 57 Col. L. Rev. 676.

occasion to consider the Fourth Amendment's relation to this broad range of investigations.[4] However, we have dealt with the Fourth Amendment issues raised by another common investigative technique, the administrative subpoena of corporate books and records. We find strong support in these subpoena cases for our conclusion that warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises.

It is now settled that, when an administrative agency subpoenaes corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.[5] The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute, but it must delimit the confines of a search by designating the needed documents in a formal subpoena. In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.

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[4] In *United States* v. *Cardiff*, 344 U. S. 174, this Court held that the Federal Food, Drug, and Cosmetic Act did not compel that consent be given to warrantless inspections of establishments covered by the Act. (As a result, the statute was subsequently amended, see note 3, *supra*.) See also *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298.

[5] See *Federal Trade Commission* v. *Morton Salt Co.*, 338 U. S. 632; *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186; *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707; *Hale* v. *Henkel*, 201 U. S. 43. See generally 1 Davis, Administrative Law §§ 3.05–3.06 (1958).

It is these rather minimal limitations on administrative action which we think are constitutionally required in the case of investigative entry upon commercial establishments. The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved. But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field.[6] Given the analogous investigative functions performed by the administrative subpoena and the demand for entry, we find untenable the proposition that the subpoena, which has been termed a "constructive" search, *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 202, is subject to Fourth Amendment limitations which do not apply to actual searches and inspections of commercial premises.

We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure.[7] We do not in any way

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[6] We do not decide whether warrants to inspect business premises may be issued only after access is refused; since surprise may often be a crucial aspect of routine inspections of business establishments, the reasonableness of warrants issued in advance of inspection will necessarily vary with the nature of the regulation involved and may differ from standards applicable to private homes.

[7] *Davis* v. *United States*, 328 U. S. 582, relied upon by the Supreme Court of Washington, held only that government officials could demand access to business premises and, upon obtaining consent to search, could seize gasoline ration coupons issued by the Government and illegally possessed by the petitioner. *Davis* thus involved the reasonableness of a particular search of business premises but did not involve a search warrant issue.

imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product. Any constitutional challenge to such programs can only be resolved, as many have been in the past, on a case-by-case basis under the general Fourth Amendment standard of reasonableness. We hold only that the basic component of a reasonable search under the Fourth Amendment—that it not be enforced without a suitable warrant procedure—is applicable in this context, as in others, to business as well as to residential premises. Therefore, appellant may not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry upon appellant's locked warehouse.

Reversed.

SUPREME COURT OF THE UNITED STATES

Nos. 92 AND 180.—OCTOBER TERM, 1966.

Roland Camara, Appellant, 92 v. Municipal Court of the City and County of San Francisco.	On Appeal From the District Court of Appeal of California, First Apellate District.
Norman See, Appellant, 180 v. City of Seattle.	On Appeal From the Supreme Court of Washington.

[June 5, 1967.]

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

Eight years ago my Brother Frankfurter wisely wrote in *Frank* v. *Maryland*, 359 U. S. 360 (1959):

> "Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts. The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few." At 372.

Today the Court renders this municipal experience, which dates back to Colonial days, for naught by overruling *Frank* v. *Maryland* and by striking down hundreds of city ordinances throughout the country and jeopardizing thereby the health, welfare, and safety of literally millions of people.

But this is not all. It prostitutes the command of the Fourth Amendment that "no Warrants shall issue, but upon probable cause" and sets up in the health and safety codes area inspection a newfangled "warrant" system that is entirely foreign to Fourth Amendment standards. It is regrettable that the Court wipes out such a long and widely accepted practice and creates in its place such enormous confusion in all of our towns and metropolitan cities in one fell swoop. I dissent.

I.

I shall not treat in any detail the constitutional issue involved. For me it was settled in *Frank* v. *Maryland*, *supra*. I would adhere to that decision and the reasoning therein of my late Brother Frankfurter. Time has not shown any need for change. Indeed the opposite is true, as I shall show later. As I read it, the Fourth Amendment guarantee of individual privacy is, by its language, specifically qualified. It prohibits only those searches that are "unreasonable." The majority seem to recognize this for they set up a new test for the long-recognized and enforced Fourth Amendment's "probable cause" requirement for the issuance of warrants. They would permit the issuance of paper warrants, in area inspection programs, with probable cause based on area inspection standards as set out in municipal codes, and with warrants issued by the rubber stamp of a willing magistrate.[1] In my view, this degrades the Fourth Amendment.

[1] Under the probable cause standard laid down by the Court, it appears to me that the issuance of warrants could more appropriately be the function of the agency involved than that of the magistrate. This would also relieve magistrates of an intolerable burden. It is therefore unfortunate that the Court fails to pass on the validity of the use of administrative warrants.

II.

Moreover, history supports the *Frank* disposition. Over 150 years of city *in rem* inspections for health and safety purposes have continuously been enforced. In only one case during all that period have the courts denied municipalities this right. See *District of Columbia* v. *Little*, 85 U. S. App. D. C. 242, 178 F. 2d 13 (1949), aff'd on other grounds, 339 U. S. 1 (1950). In addition to the two cases in this Court (*Frank, supra*, and *Ohio, ex rel. Eaton* v. *Price*, 364 U. S. 263 (1960)), which have upheld the municipal action, not a single state high court has held against the validity of such ordinances. Indeed, since our *Frank* decision five of the States' highest courts have found that reasonable inspections are constitutionally permissible and in fact imperative, for the protection of health, safety, and welfare of the millions who inhabit our cities and towns.[2]

I submit that under the carefully circumscribed requirements of health and safety codes, as well as the facts and circumstances of these particular inspections, there is nothing unreasonable about the ones undertaken here. In applying the Fourth Amendment's test of reasonableness, they are entirely consistent with the Amendment's commands and our cases.

There is nothing here that suggests that the inspection was unauthorized, unreasonable, for any improper purpose, or designed as a basis for a criminal prosecution; nor is there any indication of any discriminatory,

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[2] *M. DePass* v. *City of Spartanburg*, 234 S. C. 198, 107 S. E. 2d 350 (1959); *City of St. Louis* v. *Evans*, 337 S. W. 2d 948 (Mo. 1960); *Camara* v. *Municipal Court*, 237 Cal. App. 2d 128, 46 Cal. Rptr. 585 (1965), pet. for hearing in Cal. S. C. den. (Cir. No. 22128) Nov. 19, 1965; *Commonwealth* v. *Hadley*, 1966 Mass. Adv. Sheets 1359, Dec. 2, 1966, 222 N. E. 2d 681, appeal docketed, Jan. 5, 1967, No. 1179 Misc., O. T. 1966; *See* v. *City of Seattle*, 67 Wash. 2d 465, 408 P. 2d 262 (1966).

arbitrary, or capricious action affecting the appellant in either case. Indeed, Camara was admittedly violating the Code by living in quarters prohibited thereby; and See was operating a locked warehouse—a business establishment subject to inspection.

The majority say, however, that under the present system the occupant has no way of knowing the necessity for the inspection, the limits of the inspector's power, or whether the inspector is himself authorized to perform the search. Each of the ordinances here are supported by findings as to the necessity for inspections of this type and San Francisco specifically bans the conduct in which appellant Camara is admittedly engaged. Furthermore, all of these doubts raised by the Court could be resolved very quickly. Indeed, the inspectors all have identification cards which they show the occupant and the latter could easily resolve the remaining questions by a call to the inspector's superior or upon demand, receive a written answer thereto. The record here shows these challenges could have been easily interposed. The inspectors called on several occasions, but still no such questions were raised.[3] These cases, from the outset, were based on the Fourth Amendment, not on any of the circumstances surrounding the attempted inspection. To say, therefore, that the inspection is left to the discretion of the officer in the field is to reach a conclusion not authorized by this record or the ordinances involved here. The Court says the question is not whether the "inspections may be made but whether they may be made without a warrant." With due respect, inspections of this type have been made for over a century and a half without a warrant and it is a little late to impose a death sentence on such procedures now. In most instances the officer

[3] Indeed, appellant Camara was summoned to the office of the district attorney—but failed to appear—where he certainly could have raised these questions.

could not secure a warrant—such as in See's case—thereby insulating large and important segments of our cities from inspection for health and safety conditions. It is this situation—which is even recognized by the Court—that should give us pause.

III.

The great need for health and safety inspection is emphasized by the experience of San Francisco, a metropolitan area known for its cleanliness and safety ever since it suffered earthquake and fire back in 1908. For the fiscal year ending June 30, 1965, over 16,000 dwelling structures were inspected, of which over 5,600 required some type of compliance action in order to meet code requirements. And in 1965–1966 over 62,000 apartments, hotels, and dwellings were inspected with similar results. During the same period the Public Works Department conducted over 52,000 building inspections, over 43,000 electrical ones and over 33,000 plumbing inspections. During the entire year 1965–1966 inspectors were refused entry on less than 10 occasions where the ordinance required the householder to so permit.

In Seattle, the site of No. 180, *See* v. *City of Seattle,* fire inspections of commercial and industrial buildings totaled over 85,000 in 1965. In Jacksonville, Florida, over 21,000 fire inspections were carried on in the same year, while in excess of 135,000 health inspections were conducted. In Portland, Oregon, out of 27,000 health and safety inspections over 4,500 violations of regulations were uncovered and the fire marshal in Portland found over 17,000 violations of the fire code in 1965 alone. In Boston over 56,000 code violations were uncovered in 1966 while in Baltimore a somewhat similar situation was reported.

In the larger metropolitan cities such as Los Angeles, over 300,000 inspections (health and fire) revealed over 28,000 hazardous violations. In Chicago during the

period November 1965 to December 1966, over 18,000 buildings were found to be rodent infested out of some 46,000 inspections. And in Cleveland the division of housing found over 42,000 violations of its code in 1965; its health inspectors found over 33,000 violations in commercial establishments alone and over 27,000 dwelling code infractions were reported in the same period. And in New York City the problem is even more acute. A grand jury in Brooklyn conducted a housing survey of 15 square blocks in three different areas and found over 12,000 hazardous violations of code restrictions in those areas alone. Prior to this test there were only 567 violations reported in the entire area. The pressing need for inspection is shown by the fact that some 12,000 additional violations were actually present at that very time.

An even more disastrous effect will be suffered in plumbing violations. These are not only more frequent but also the more dangerous to the community. Defective plumbing causes back siphonage of sewage and other household wastes. Chicago's disastrous amoebic dysentery epidemic is an example. Over 100 deaths resulted. Fire code violations also often cause many conflagrations. Indeed, if the fire inspection attempted in *District of Columbia* v. *Little*, 339 U. S. 1 (1950), had been permitted a two-year-old child's death resulting from a fire that gutted the home involved there on August 6, 1964, might well have been prevented.

Inspections also play a vital role in urban redevelopment and slum clearance. Statistics indicate that slums constitute 20% of the residential area of the average American city, still they produce 35% of the fires, 45% of the major crimes, and 50% of the disease. Today's decision will play havoc with the many programs now designed to aid in the improvement of these areas.

We should remember the admonition of MR. JUSTICE DOUGLAS in *Berman* v. *Parker*, 348 U. S. 26, 32 (1954):

> "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing those who live there to the status of cattle. They may indeed make living an almost insufferable burden."

IV.

The majority propose two answers to this admittedly pressing problem of need for constant inspection of premises for fire, health, and safety infractions of municipal codes. First, they say that there will be few refusals of entry to inspect. Unlike the attitude of householders as to codes requiring entry for inspection, we have few empirical statistics on attitudes where consent must be obtained. It is true that in the required entry to inspect situations most occupants welcome the periodic visits of municipal inspectors. In my view this will not be true when consent is necessary. The City of Portland, Oregon, has a voluntary home inspection program. The 1966 record shows that out of 16,171 calls where the occupant was at home, entry was refused in 2,540 cases—approximately one out of six. This is a large percentage and would place an intolerable burden on the inspection service when required to secure warrants. What is more important is that out of the houses inspected 4,515 hazardous conditions were found! Hence, on the same percentage, there would be approximately 800 hazardous situations in the 2,540 in which inspection was refused in Portland.

Human nature being what it is, we must face up to the fact that thousands of inspections are going to be denied. The economics of the situation alone will force this result. Homeowners generally try to minimize maintenance costs

and some landlords make needed repairs only when required to do so. Immediate prospects for costly repairs to correct possible defects are going to keep many a door closed to the inspector. It was said by way of dissent in *Frank* v. *Maryland, supra,* at 384, that "one rebel a year" is not too great a price to pay for the right to privacy. But when voluntary inspection is relied upon this "one rebel" is going to become a general rebellion. That there will be a significant increase in refusals is certain and, as time goes on, that trend may well become a frightening reality. It is submitted that voluntary compliance cannot be depended upon.

The Court then addresses itself to the propriety of warrantless area inspections.[4] The basis of "probable cause" for area inspection warrants, the Court says, begins with the Fourth Amendment's reasonableness requirement; in determining whether an inspection is reasonable "the need for the inspection must be weighed in terms of these reasonable goals of code enforcement." It adds that there are "a number of persuasive factors" supporting "the reasonableness of code enforcement area inspections." It is interesting to note that the factors the Court relies upon are the identical ones my Brother Frankfurter gave for excusing warrants in *Frank* v. *Maryland, supra.* They are: long acceptance historically; the great public interest in health and safety; and the impersonal nature of the inspections—not for evidence of crime—but for the public welfare. Upon this reasoning, the Court concludes that probable cause exists "if reasonable legislative or administrative standards for

[4] It is interesting to note that in each of the cases here the authorities were making periodic area inspections when the refusals to allow entry occurred. Under the holding of the Court today, "probable cause" would therefore be present in each case and a "paper warrant" would issue as a matter of course. This but emphasizes the absurdity of the holding.

conducting an area inspection are satisfied with respect to a particular dwelling." These standards will vary, it says, according to the code program and the condition of the area with reference thereto rather than the condition of a particular dwelling. The majority seems to hold that warrants may be obtained after a refusal of initial entry; I can find no such constitutional distinction or command. This boxcar warrant will be identical as to every dwelling in the area, save the street number itself. I daresay they will be printed up in pads of a thousand or more—with space for the street number to be inserted—and issued by magistrates in broadcast fashion as a matter of course.

I ask: Why go through such an exercise, such a pretense? As the same essentials are being followed under the present procedures, I ask: Why the ceremony, the delay, the expense, the abuse of the search warrant? In my view this will not only destroy its integrity but will degrade the magistrate issuing them and soon bring disrepute not only upon the practice but upon the judicial process. It will be very costly to the city in paperwork incident to the issuance of the paper warrants, in loss of time of inspectors and waste of the time of magistrates and will result in more annoyance to the public. It will also be more burdensome to the occupant of the premises to be inspected. Under a search warrant the inspector can enter any time he chooses. Under the existing procedures he can enter only at reasonable times and invariably the convenience of the occupant is considered. I submit that the identical grounds for action elaborated today give more support—both legal and practical—to the present practice as approved in *Frank* v. *Maryland*, *supra*, than it does to this legalistic facade that the Court creates. In its anxiety to limit its own holding as to mass searches it hopes to divert attention from the fact that it destroys the health and safety codes as they apply

to individual inspections of specific problems as contrasted to area ones. While the latter are important, the individual inspection is often the more so; that was true in *Little* v. *District of Columbia* and it may well be in both *Camara* and *See*. Frankly, I cannot understand how the Court can authorize warrants in wholesale fashion in the case of an area inspection, but hold the hand of the inspector when a specific dwelling is hazardous to the health and safety of its neighbors.